TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 270

CECIL W. ARMSTRONG, ET AL., PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 3, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 270

CECIL W. ARMSTRONG, ET AL., PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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[fol. 1]

IN THE UNITED STATES COURT OF CLAIMS

No. 53256

(1) Cecil W. Armstrong and Marie I. Armstrong, co-partners doing business as Armstrong Products Company

(2) Baltimore Copper Paint Co., a division of Oliver Reeder and Son, Inc.

(3) Orrin E. Benner, doing business as Thomaston Steel Works

(4) Mason C. Carter

(5) Chase Brass & Copper Co.

(6) Columbian Bronze Corp.

(7) Maurice W. Dennison, Thomas G. Lynah and Charles J. Winkler, Jr., Trustees doing business as Braman, Dow & Co.

(8) The Dexolium Corporation

(9) Heywood-Wakefield Company

(10) E. F. Hutchinson, doing business as Ned's Garage

(11) Kainer & Company

(12) O. O. Keiver Lumber Corp.

(13) Kennebec Wharf & Coal Company, a division of Staples Coal Company

(14) Hiema J. Kuhls, Anna Kuhls Yates, Gladys Kuhls Woodel and Frieda Kuhls Woodel, co-partners doing business as H. B. Fred Kuhls

(15) Le John Manufacturing Company

(16) Marine Service Inc.

(17) Marshall & Company, Inc.

(18) Richardson, Dana & Co., Inc.

(19) Alfred B. Sherman, doing business as Campbell-Built Products

(20) The Southington Hardware Manufacturing Company

(21) Surrette Storage Battery Co., Inc.

(22) W. & J. Tiebout, Inc.

(23) Kenneth M. Walbridge and Robert P. Walbridge, co-partners doing business as Walbridge Bros.

(24) Wilcox-Crittenden Division of North & Judd Manufacturing Co.

(25) Winde-McCormick Lumber Company

(26) Wickwire Spencer Steel Division, The Colorado Fuel and Iron Corporation

(27) Maximilian P. Wurf, doing business as Transplastics Fabricating Co., Plaintiffs,

v.

The United States of America, Defendant.

Petition—Filed December 21, 1956

[fol. 2] Plaintiffs, Cecil W. Armstrong and Marie I. Armstrong, co-partners doing business under the firm name and style of Armstrong Products Company; Baltimore Copper Paint Co., a division of Oliver Reeder & Son, Inc.; Orrin F. Benner, doing business under the firm name and style of Thomaston Steel Works; Mason C. Carter; Chase Brass & Copper Co., a body corporate; Columbian Bronze Corp.; Maurice W. Dennison, Thomas G. Lynah & Charles J. Winkler, Jr., Trustees doing business under the firm name and style of Braman, Dow & Co., a Massachusetts trust; The Dexolium Corporation; [illegible]ywood-Wakefield Company, a body corporate; E. F. Hutchinson, doing business under

the firm name and style of Ned's Garage; Kainer & Company, a body corporate; O. O. Keiver Lumber Corp.; Kennebec Wharf & Coal Company, a division of Staples Coal Company, a body corporate; Rienia J. Kuhls, Anna Kuhls Yates, Gladys Kuhls Woodel and Frieda Kuhls Woodel, co-partners doing business under the firm name and style of H. B. Fred Kuhls; Le John Manufacturing Company, a body corporate; Marine Service Inc.; Marshall & Company, Inc.; Richardson, Dana & Co., Inc.; Alfred B. Sherman doing business under the firm name and style Campbell-Built Products; the Southington Hardware Manufacturing Company, a body corporate; Surrette Storage Battery Co., Inc.; W. & J. Tiebout, Inc.; Kenneth M. Walbridge and Robert P. Walbridge, co-partners doing business under the firm name and style Walbridge Bros.; Wilcox-Crittenden Division of North & Judd Manufacturing Co., a body corporate; Winde-McCormick Lumber Company, a body corporate; Wickwire Spencer Steel Division, The Colorado Fuel and Iron Corporation; Maximilian P. Wurf doing business under the firm name and style Transplastics Fabricating Co.; (all of the foregoing individual plaintiffs, co-partnerships and trustees being hereinafter referred to by their respective firm names in each instance that business is done under a firm name); by their attorneys, respectfully represent:

[fol. 3] 1. Plaintiffs are five individually-owned companies, three partnerships, a Massachusetts trust and 18 corporations, all specifically designated along with the locations of their respective principal offices in Appendix A, which is annexed hereto and made a part hereof.

2. Under date of March 26, 1954, the Department of the Navy awarded contract NObs-3572 to the Rice Shipbuilding Corporation (hereinafter referred to as "Rice") to supply eleven 40-foot personnel boats, Mark II, which were to be constructed at Rice's plant at East Boothbay, Maine.

3. Rice was unable to complete the construction of the eleven boats, and on August 2, 1955, the defendant terminated the subject contract for default.

4. Pursuant to the request of the Contracting Officer, Rice, under date of August 4, 1955, executed an itemized "Instrument of Transfer of Title" which had been submitted to it by the Contracting Officer. This instrument, in effect, transferred to the defendant legal title to all of the materials, supplies and hulls in the possession or control of Rice which were incorporated or to be incorporated into the boats being constructed under the subject contract.

5. At the special instance and request of Rice, each of the plaintiffs furnished certain supplies, materials and equipment for application on and use in connection with the construction of the said boats to be manufactured by Rice for the defendant in performance of the subject contract. As a consequence of and in consideration of the furnishing of work, labor, services, materials and supplies by the plaintiffs, there became due and now remain owing to each of the plaintiffs the respective sums set forth in Appendix A annexed hereto and made a part hereof.

6. Pursuant to the provisions of section 13, chapter 178 of the Revised Statutes of Maine, 1954, each of the plaintiffs had a good and valid lien on the said boats and hulls and on the materials and supplies furnished by each plaintiff on the dates of the transfer of title and possession of the said hulls, materials and supplies to the defendant.

[fol. 4] 7. Subsequent to taking title, the defendant took possession of all items listed in the "Instrument of Transfer of Title" and, upon information and belief, removed them from the State of Maine, thereby depriving the plaintiffs of their right to exercise their liens. The defendant did not take any legal steps which foreclosed the rights of the plaintiffs to their respective liens.

8. Upon taking title to and possession of the said hulls, materials and supplies, the defendant became obligated under the Fifth Amendment to the Constitution of the United States to pay to each of the plaintiffs just compensation for their respective lien and property rights in the said hulls, materials and supplies.

9. Despite a demand for the same, the defendant has failed and refused to pay just compensation to the plain-

tiffs for the destruction of their lien and property rights to the hulls, materials and supplies taken by the defendant.

10. No other action has been had on the claims of plaintiffs, nor on any of them, in Congress or in any of the departments of the Government, except as hereinbefore alleged.

Wherefore, the plaintiffs pray for judgment against the defendant in the aggregate sum of $23,732.72 in accordance with their respective interest, as set forth in the annexed schedule, together with interest as part of just compensation, together with appropriate costs.

Solomon Dimond, Attorney for Plaintiffs, 1011 New Hampshire Avenue, N.W., Washington 7, D.C.,
Of Counsel, Burton R. Thorman.

[fol. 5]

Appendix "A" to Petition

Rice Shipbuilding Corp.—NOBS No. 3572

	Name of Plaintiff	Location of Principal Office	Amount of Claim
1.	Cecil W. Armstrong and Marie I. Armstrong, co-partners d/b/a Armstrong Products Company	Warsaw, Indiana	$ 134.3
2.	Baltimore Copper Paint Co., a division of Oliver Reeder & Son, Inc.	Baltimore, Maryland	153.9
3.	Orrin F. Benner, d/b/a Thomaston Steel Works	Thomaston, Maine	477.7
4.	Mason C. Carter	Woolwich, Maine	39.47
5.	Chase Brass & Copper Co., a body corporate	Waterbury, Connecticut	30.36
6.	Columbian Bronze Corp.	Freeport, Long Island, New York	904.06
7.	Maurice W. Dennison, Thomas G. Lynah, Charles J. Winkler, Jr., Trustees d/b/a Braman, Dow & Co., a Massachusetts trust	Boston, Massachusetts	442.57
8.	The Dexolium Corporation	South Norwalk, Conn.	529.37
9.	Heywood Wakefield Company, a body corporate	Gardner, Massachusetts	320.00
10.	E. F. Hutchinson d/b/a Ned's Garage	Boothbay Harbor, Maine	51.51
11.	Kainer & Company, a body corporate	Chicago, Illinois	3376.67
12.	O. O. Keiver Lumber Corp.	Beverly, Massachusetts	1349.24
13.	Kennebec Wharf & Coal Company, a division of Staples Coal Company, a body corporate	Boston, Massachusetts	211.19
14.	Hiema J. Kuhls, Anna Kuhls Yates, Gladys Kuhls Woodel and Frieda Kuhls Woodel, co-partners d/b/a H. B. Fred Kuhls	Brooklyn, New York	115.98
15.	Le John Manufacturing Company, a body corporate	Huntington, West Virginia	1320.00
16.	Marine Service Inc.	Boothbay Harbor, Maine	402.33
17.	Marshall & Company, Inc.	Boston, Massachusetts	165.63
18.	Richardson, Dana & Co., Inc.	Portland, Maine	784.70
19.	Alfred B. Sherman d/b/a Campbell-Built Products	Boothbay Harbor, Maine	106.27
20.	The Southington Hardware Manufacturing Company, a body corporate	Southington, Connecticut	334.80
21.	Surrette Storage Battery Co., Inc.	Salem, Massachusetts	1298.09
22.	W. & J. Tiebout, Inc.	New York, New York	2857.56
23.	Kenneth M. Walbridge and Robert P. Walbridge, co-partners d/b/a Walbridge Bros.	Boothbay Harbor, Maine	75.18
24.	Wilcox-Crittenden Division of North & Judd Manufacturing Co., a body corporate	Middletown, Connecticut	403.26
25.	Winde-McCormick Lumber Company, a body corporate	Charlestown, Massachusetts	6221.37
26.	Wickwire Spencer Steel Division of the Colorado Fuel and Iron Corporation	Buffalo, New York	1193.50
27.	Maximilian P. Wurf d/b/a Transplastics Fabricating Co.	Boston, Massachusetts	160.38
		TOTAL	$23,732.72

[fol. 7]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

DEFENDANT'S ANSWER—Filed June 21, 1957

Defendant, for its answer to the petition herein, admits, denies and alleges as follows:

1. Denies the allegations in paragraph 1 of the petition for lack of knowledge or information sufficient to form a belief as to the truth thereof.

2. Admits the allegations in paragraph 2 of the petition.

3. Admits, in answer to the allegations in paragraph 3 of the petition, that the contractor did not complete the construction of the 11 boats, and that by letter dated August 2, 1955, defendant terminated the subject contract for default. Denies, for lack of knowledge or information sufficient to form a belief as to the truth thereof, the allega-
[fol. 8] tion in said paragraph that the contractor was "unable" to complete the construction.

4. Admits, in answer to the allegations in the first sentence in paragraph 4 of the petition, that as of August 4, 1955, the contractor executed an itemized "Instrument of Transfer of Title Under Contract NObs-3572." Denies the allegation that such execution was "pursuant to the request of the Contracting Officer," and alleges the fact to be that such execution was at the direction of the Contracting Officer pursuant to Clause 11(d) of the General Provisions of said contract. Counsel for defendant has been unable to obtain knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said first sentence, and defendant, therefore, denies the same. Submits that the remaining allegations in said paragraph 4 are conclusions of law which do not require an answer; insofar as they may be deemed to be allegations of material fact, they are denied. By way of further answer, defendant states that the subject matter of said instrument was the contractor's right, title and interest in and to certain "manufacturing materials," within the mean-

ing of the contract, as were designated by a representative of defendant.

5. Denies the allegations in paragraph 5 of the petition for lack of knowledge or information sufficient to form a belief as to the truth thereof.

6. Submits that the allegations in paragraph 6 are conclusions of law which do not require an answer; insofar as they may be deemed to be allegations of material fact, they are denied.

[fol. 9] 7. Admits, in answer to the allegations in the first sentence in paragraph 7 of the petition, that subsequent to the execution of the said "Instrument of Transfer of Title Under Contract NObs-3572," defendant took possession of items listed in said instrument, and removed them from the State of Maine. By way of further answer, defendant states that said items were removed to other shipyards for completion of the supplies called for by the subject contract. Counsel for defendant has been unable to obtain knowledge or information sufficient to form a belief as to the truth of the allegations that defendant took possession of "all" items listed, and removed "all" items from the State of Maine, and defendant, therefore, denies the same. Submits that the remaining allegations in said paragraph 7 are conclusions of law which do not require an answer; insofar as they may be deemed to be allegations of material fact, they are denied.

8. Submits that the allegations in paragraph 8 of the petition are conclusions of law which do not require an answer; insofar as they may be deemed to be allegations of material fact, they are denied. By way of further answer, defendant specifically denies that defendant is obligated to pay to each, or any, of the plaintiffs any sum whatsoever.

9. Counsel for defendant has been unable to obtain knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the petition that plaintiffs made "demand for" and "defendant has failed and refused to pay" the alleged claim which is the subject of plaintiffs' petition, and defendant, therefore,

[fol. 10] denies said allegations. Denies, in answer to the remaining allegations in said paragraph, that defendant destroyed any lien or property rights in plaintiffs to the materials which were the subject of the "Instrument of Transfer of Title Under Contract NObs-3572," denies that such materials were "taken" by defendant, and denies that plaintiffs are entitled to any amount whatsoever as "just compensation" from defendant. Denies all allegations of material fact in said paragraph 9 which are not herein admitted, denied or otherwise responded to.

10. Counsel for defendant has been unable to obtain knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of the petition, and defendant, therefore, denies the same.

11. Denies all allegations of material fact in the petition which are not herein admitted, denied or qualified.

Wherefore, defendant demands judgment dismissing plaintiff's petition.

George Cochran Doub, Assistant Attorney General, Civil Division.

Kathryn H. Baldwin, Attorney, Civil Division, Department of Justice.

[fol. 13]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—
Filed April 10, 1958

Defendant moves the Court for summary judgment on the ground that there is no genuine issue of material fact, and, as a matter of law, defendant is entitled to judgment dismissing plaintiffs' petition. In support of its motion, defendant relies upon the pleadings as filed, and its brief and exhibits submitted herewith.

[fol. 37]

APPENDIX TO MOTION

Affidavit of F. L. Ruhlman

District of Columbia: ss

F. L. Ruhlman, being first duly sworn, deposes and says that he is the Assistant Chief of the Bureau of Ships of the Department of the Navy with the rank of Captain; that in such capacity, his official duties include, among other things, the general supervision of official records pertaining to shipbuilding contracts made by the Bureau of Ships, Department of the Navy. Such official records reveal the following:

On March 26, 1954, there was awarded to Rice Shipbuilding Corporation, East Boothbay, Maine, by the Department of the Navy, Contract NObs-3572 for the construction of eleven 40' personnel boats, Mark II, for the total sum of $175,900, a copy of which contract is attached hereto as Exhibit A.

These personnel boats are constructed to specifications of the Department of the Navy, and they are, among other things, used aboard and in operation with such combat vessels as aircraft carriers, battleships and cruisers.

The contractor entered on performance of the contract, and by letter dated August 2, 1955, the contractor was notified of termination of the contract for default in performance, and was directed, pursuant to Clause 11(d) of the General Provisions of the contract, to transfer to the Government title to the partially completed vessels and to such manufacturing materials, within the meaning of the contract, as should be designated by the Government, a copy of which notice is attached hereto as Exhibit B. The contractor did not appeal the termination of the contract.

Pursuant to such direction, the contractor executed an Instrument of Transfer of Title Under Contract NObs-3572, dated August 4, 1955, transferring to the Government all of the contractor's right, title and interest in and to the said property, a copy of which instrument is attached hereto as Exhibit C.

[fol. 38] All of the manufacturing material and equipment, title to which was transferred to the Government pur-

suant to said Instrument of Transfer of Title, was shipped by the Supervisor of Shipbuilding USN and Naval Inspector of Ordnance at Bath, Maine, to three Naval Shipyards for completion of the ten uncompleted boats. Hull Nos. C-73968 and C-73969, together with outfit, equipment and materials, were shipped to and received by the Norfolk Naval Shipyard (Exhibits D and D-1, hereto); hulls Nos. C-73970 through C-73972, together with outfit, equipment and materials, were shipped to and received by the New York Naval Shipyard (Exhibits E and E-1, hereto); and hulls Nos. C-73973 through C-73977, together with outfit, equipment and materials were shipped to and received by the Philadelphia Naval Shipyard (Exhibits F and F-1, hereto). All materials so shipped to such Naval Shipyards, with the minor exceptions noted in the records of the Philadelphia Naval Shipyard, were used in completion of the said boats (Exhibits D, E and F).

Completion costs of said boats, exclusive of equipment shipped from Maine and used in completion, were:

Norfolk Naval Shipyard	$ 15,151.47
New York Naval Shipyard	43,915.11
Philadelphia Naval Shipyard	108,110.86

(Exhibits D-2, E-2 and F-2, hereto).

Between June 21, 1954, and April 27, 1955, the Government paid to the contractor as progress payments on said contract the total amount of $141,387.20, which amount represented estimated earnings of $145,760.00, less the reserve of 3% of payments retained in accordance with the terms of the contract (Exhibit G, hereto).

By letter dated March 13, 1957, demand was made upon the contractor for excess costs in the amount of $146,470.28 [fol. 39] (Exhibit H, hereto), which costs were computed by the Contracting Officer as follows:

Original Contract price	$175,900.00
Adjudicated change orders:—none	
Amendments increasing or decreasing contract price:—none	
Progress payments made to contractor	141,387.20
Undisbursed funds on contract	$ 34,512.80

Costs incurred by Government in having ten undelivered vessels completed by Naval Shipyards:			
Protection costs from date of termination to date of shipment		$ 4,388.74	
Cost of preparing the ten hulls for shipment		6,450.00	
Transportation costs (3 hulls to New York, 2 hulls to Norfolk, 5 hulls to Philadelphia)		4,007.00	
Completion Costs:			
New York	$ 43,915.11		
Norfolk	15,151.47		
Phila.	107,560.76	$166,627.34	
Total costs incurred by Government			$181,473.08
Less:			
(a) Undisbursed funds on contract NObs-3572		34,512.80	
(b) Credit for estimated work accomplished by Rice on unadjudicated change orders		490.00	
			35,002.80
Excess costs			$146,470.28

(Exhibit I, hereto). Subsequent to such computation an additional amount of $550.10 was paid for charges for materials used by the Philadelphia Naval Shipyard on the boats completed by that yard (Exhibit F-2). No part of said excess costs has been paid; and the contractor did not [fol. 40] appeal the assessment of such costs.

Further, affiant saith not.

F. L. Ruhlman

Subscribed and sworn to before me this 9th day of April, 1958.

Katharyne A. Thomason, Notary Public, District of Columbia, my Commission expires Sept. 30, 1961.

(Notarial Seal)

[fol. 41]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT—
Filed May 21, 1958

Plaintiffs move the Court for an order granting summary judgment for the plaintiffs on the grounds that there is no genuine issue as to any material fact, and the plaintiffs are entitled to judgment as a matter of law. In support of this motion, the plaintiffs rely upon the affidavits of Leonard Salter, Trustee in Bankruptcy, dated April 29, 1957, and of Henry Halpern, dated April 26, 1957, which are annexed hereto and made a part hereof, and upon plaintiffs' brief in support of this motion and in opposition to the defendant's motion for summary judgment.

[fol. 59]

APPENDIX "A" TO MOTION

Affidavit of Henry Halpern

State of Massachusetts
County of Suffolk

Henry Halpern, of 30 Huntington Avenue, Boston 16, Massachusetts, being duly sworn, deposes and says that:

1. He was the President of Rice Shipbuilding Corporation at all times during the performance of Contract No. NObs 3572, and until such time as the corporation was adjudicated a bankrupt.

2. The following claims, which are taken from the books of the corporation, are true and correct and represent work, labor, services, materials, supplies or equipment furnished to the corporation for use in connection with Department of the Navy Contract No. NObs 3572:

Name and Address	*Consideration*	*Amount*
Armstrong Products Co. Argonne Road, Warsaw, Indiana Oliver Reeder & Son	Material	$ 134.30
Baltimore Copper Paint Co. 501 Key Highway, Baltimore 30, Md.	Material	153.00
Thomaston Steel Works 3 Green Street, Thomaston, Maine	Material	477.78
Mason C. Carter Woolwich, Maine	Services	316.47
[fol. 60]		
Chase Brass & Copper Co. 236 Grand Street, Waterbury, Conn.	Material	30.58
Columbian Bronze Corp. 216 N. Main Street, Freeport, N.Y.	Material	904.08
Braman Dow & Co. 239 Causeway Street, Boston, Mass.	Material	442.57
The Dexolium Corp. 29 Haviland Street, S. Norwalk, Conn.	Material	529.37
Heywood-Wakefield Co. Gardner, Massachusetts	Material	320.00
Ned's Garage Boothbay Harbor, Maine	Merchandise	51.51
Kainer & Co. 763 W. Lexington St., Chicago, Ill.	Material	3376.67
O. O. Keiver Lumber Corp. 82 River Street, Beverly, Mass.	Material	1346.24

Name and Address	*Consideration*	*Amount*
Staples Coal Co., d b a Kennebec Wharf & Coal Co. 80 Front Street, Bath, Maine	Material	$ 211.19
H. B. Fred Kuhls 6413 Third Ave., Brooklyn, N.Y.	Material	115.98
Le John Manufacturing Co. 111 22nd St., Huntington, West Va.	Material	1320.00
Marine Service, Inc. 102 Commercial St., Boothbay Harbor, Me.	Material	402.33
Marshall & Co., Inc. 368 Congress Street, Boston, Mass.	Material	165.63
Richardson, Dana & Co. 464 Commercial Street, Portland 3, Me.	Material	784.70
Campbell-Built Products Boothbay Harbor, Maine	Material	106.27
The Southington Hardware Mfg. Co. 168 Center St., Southington, Conn.	Material	334.80
Surette Storage Battery Co. Jefferson Avenue, Salem, Mass.	Material	1298.00
W. & J. Tiebout, Inc. 64 Front Street, New York, N. Y.	Material	2857.56
Walbridge Bros. Wiscasset Road, Boothbay Harbor, Me.	Material	75.18
[fol. 61]		
Wilcox-Crittenden, Div. of North & Judd Mfg. Co. High & Warwick Sts., Middletown, Conn.	Material	403.26
Winde-McCormack Lumber Co. 412 Medford St., Charlestown, Mass.	Material	6221.37
Wickwire Spencer Steel Div. of the Colorado Fuel & Iron Corp. 361 Delaware Avenue, Buffalo, N.Y.	Material	1193.50
Transplasties Fabricating Co. 34 Cambria Street, Boston 15, Mass.	Material	160.38
	Total	$23,732.72

3. The corporation did not have any other business from the date of its organization until the date it was adjudicated a bankrupt other than the performance of the said contract NObs 3572.

4. To the best of my knowledge and belief, the corporation had no claims or offsets which could be applied in reduction of the above-listed claims.

Henry Halpern

Sworn to before me this 26th day of April, 1957.

Philip Collier, Notary Public.

(Seal)

[fol. 63]

APPENDIX "B" TO MOTION

Affidavit of Leonard Salter

State of Massachusetts
County of Suffolk

Leonard Salter, of One Court Street, Boston 8, Massachusetts, being duly sworn, deposes and says that:

1. He is an attorney-at-law, and was elected Trustee in Bankruptcy of Rice Shipbuilding Corporation and qualified as such and is still serving in that capacity.

2. The following creditors of Rice Shipbuilding Corporation have duly filed their claims with the bankrupt estate:

Name and Address	*Consideration*	*Amount*
Armstrong Products Co. Argonne Road, Warsaw, Indiana	Material	$ 134.30
Oliver Reeder & Son Baltimore Copper Paint Co. 501 Key Highway, Baltimore 30, Md.	Material	153.00
Thomaston Steel Works 3 Green Street, Thomaston, Maine	Material	477.78
Mason C. Carter Woolwich, Maine	Services	316.47
Chase Brass & Copper Co. 236 Grand Street, Waterbury, Conn.	Material	30.58
[fol. 64]		
Columbian Bronze Corp. 216 N. Main Street, Freeport, N.Y.	Material	904.08
Braman Dow & Co. 239 Causeway Street, Boston, Mass.	Material	442.57
The Dexolium Corp. 29 Haviland Street, S. Norwalk, Conn.	Material	529.37
Heywood-Wakefield Co. Gardner, Massachusetts	Material	320.00
Ned's Garage Boothbay Harbor, Maine	Merchandise	51.51
Kainer & Co. 763 W. Lexington St., Chicago, Ill.	Material	3376.67
O. O. Keiver Lumber Corp. 82 River Street, Beverly, Mass.	Material	1346.24

Name and Address	*Consideration*	*Amount*
Staples Coal Co., d b'a Kennebec Wharf & Coal Co. 80 Front Street, Bath, Maine	Material	$ 211.19
H. B. Fred Kuhls 6413 Third Ave., Brooklyn, N.Y.	Material	115.98
Le John Manufacturing Co. 111 22nd St., Huntington, West Va.	Material	1320.00
Marine Service, Inc. 102 Commercial St., Boothbay Harbor, Me.	Material	402.33
Marshall & Co., Inc. 368 Congress Street, Boston, Mass.	Material	165.63
Richardson, Dana & Co. 464 Commercial Street, Portland 3, Me.	Material	784.70
Campbell Built Products Boothbay Harbor, Maine	Material	106.27
The Southington Hardware Mfg. Co. 168 Center St., Southington, Conn.	Material	334.80
Surette Storage Battery Co. Jefferson Avenue, Salem, Mass.	Material	1298.00
W. & J. Tiebout, Inc. 64 Front Street, New York, N. Y.	Material	2857.56
Walbridge Bros. Wiscasset Road, Boothbay Harbor, Me. [fol. 65]	Material	75.18
Wilcox Crittenden, Div. of North & Judd Mfg. Co. High & Warwick Sts., Middletown, Conn.	Material	403.26
Winde-McCormack Lumber Co. 412 Medford St., Charlestown, Mass.	Material	6221.37
Wickwire Spencer Steel Div. of the Colorado Fuel & Iron Corp. 361 Delaware Avenue, Buffalo, N. Y.	Material	1193.50
Transplastics Fabricating Co. 34 Cambria Street, Boston 15, Mass.	Material	160.38
	Total	$23,732.72

3. The foregoing claims, after investigation, have been accepted as true and correct, and that, to the best of his knowledge and belief, there are no claims or offsets which the bankrupt estate has against the above-listed creditors.

4. There are no assets in the estate, nor will any become available to the estate, with which to pay the above-listed creditors.

Sworn to before me this 29th day of April, 1957.

/s/ Hyman Gessman
Notary Public (Seal)

[fol. 69]

IN THE UNITED STATES COURT OF CLAIMS

No. 532-56

CECIL W. ARMSTRONG, et al.

v.

THE UNITED STATES

Mr. Burton R. Thorman for the plaintiffs. Mr. Solomon Dimond was on the brief.

Miss Kathryn H. Baldwin, with whom was Mr. Assistant Attorney General George Cochran Doub, for the defendant.

OPINION—January 14, 1959

On defendant's and plaintiffs' motions for summary judgment.

JONES, *Chief Judge*, delivered the opinion of the court:

Petitioners were subcontractors under a contract executed with the Department of the Navy for the construction of military vessels. They bring this action to recover just compensation under the Fifth Amendment to the Constitution for property rights allegedly taken by defendant. Those rights consisted of statutory liens which plaintiffs claim were acquired under Maine law by reason of having provided materials and services in the construction of the vessels.

There appears to be substantial agreement between the parties as to the circumstances giving rise to plaintiffs' claim, and both parties have therefore moved for summary judgment.

In March 1954, defendant, acting through the Department of the Navy, entered into a contract for the construc-

tion of 11 personnel boats with the Rice Shipbuilding Cor-[fol. 70] poration of East Boothbay, Maine.[1] For this work defendant agreed to pay $175,900.

After performance of the contract had begun, defendant commenced to make progress payments to the contractor based upon the estimated percentages of the work completed, less 3 percent retained percentages. At the request of the Rice Shipbuilding Corporation, plaintiffs furnished it with supplies, materials, and equipment in connection with its performance of the Navy contract. It is alleged in the petition that amounts are due the plaintiffs as consideration for furnishing such materials and supplies, and for work, labor, and services performed in connection therewith.

In August 1955, the Rice Shipbuilding Corporation was notified by letter that defendant had terminated the contract for default because of Rice's failure to deliver the boats within the specified time and to make satisfactory progress in performance of the contract. The contractor was also informed that defendant would exercise its rights under clause 11 (c) of the contract and have the undelivered vessels completed by another shipbuilder, with the contractor held liable for any excess costs of completion. The final paragraph of the letter directed the contractor, pursuant to clause 11 (d) of the general provisions of the contract, to transfer title to the Government of the partially completed vessels and certain "manufacturing materials,"[2] and to deliver those vessels and materials in

[1] Personnel boats of the type under contract were to be used aboard and in connection with the operation of combat vessels such as aircraft carriers, battleships, and cruisers.

[2] Clause 11 (d) of the contract's general provisions provided:

"11. Default.

* * * * *

"(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called 'manufacturing materials') as the Contractor has specifically pro-

the manner and at the time specified by a designated representative of the Navy.

[fol. 71] As a consequence, the contractor executed a document entitled "Instrument of Transfer of Title" by which it transferred to defendant all of the transferor's right, title, and interest in the "manufacturing materials" as specified by defendant. The Government thereafter removed these materials from Maine and delivered them to naval shipyards at New York, Philadelphia, and Norfolk where the boats were completed, the materials transferred being used in their construction.[3]

Prior to termination of the contract, defendant paid the Rice Shipbuilding Corporation $141,387.20 in the form of progress payments. The cost of completing the boats amounted to $166,627.34, exclusive of the materials transferred to defendant and subsequently used in the construction work. This added cost to the Government resulted in the assessment of "excess costs" against the contractor, determined by the contracting officer to be $146,470.28. Demand was made upon the contractor for payment of these excess costs. No part of this amount has been paid. The contractor, now adjudicated a bankrupt, did not appeal the termination of the contract or the assessment of excess costs.

Plaintiffs' case rests on the assertion that they acquired "good and valid" liens on the vessels and the materials

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duced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. The Government shall pay to the Contractor the contract price for completed supplies delivered to and accepted by the Government, and the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property. Failure to agree shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes'."

[3] When the contract was terminated, one vessel had been completed and delivered to the Government, and the remaining ten vessels were in various stages of completion.

furnished for their construction under section 13, chapter 178 of the Revised Statutes of Maine, 1954.[4] It was these liens which were allegedly taken by the Government when it obtained title to the partially completed vessels and manufacturing materials, and which were subsequently removed from Maine for completion elsewhere. The immediate question before us is thus whether plaintiffs had [fol. 72] the "property rights" which they claim. If not, the Government has taken nothing.

It is Federal law, and not the law of a particular state, which governs the construction of contracts to which the United States is a party. *United States* v. *Allegheny County*, 322 U.S. 174 (1944). This principle is founded upon the supremacy clause of the Constitution of the United States,[5] which was designed to prevent the disparities, confusions, and conflicts that would ensue were the Federal authority subjected to state controls.

The Supreme Court on several occasions has stated in general terms that laborers and materialmen can acquire no lien on a Government work. *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 241 (1947); *Equitable Surety Co.* v. *McMillan*, 234 U.S. 448, 455 (1914); *Hill* v. *American Surety Company of New York*, 200 U.S. 197, 203 (1906). While the Supreme Court has not been called upon to determine the question of whether subcontractors may obtain recovery against the United States under the Fifth Amend-

[4] Section 13, chapter 178, Revised Statutes of Maine, 1954, provides as follows:

"'Whoever furnishes labor or materials for building a vessel has a lien on it therefor, which may be enforced by attachment thereof within 4 days after it is launched; but if the labor and materials have been so furnished by virtue of a contract not fully completed at the time of launching of the vessel, the lien may be enforced within 4 days after such contract has been completed. He also has a lien on the materials furnished before they become part of the vessel, which may be enforced by attachment; and the owners of any dry dock or marine railway used for any vessel have a lien on said vessel for the use of said dock or railway, to be enforced by attachment within 4 days after the last day in which the same is used or occupied by said vessel."

[5] Article VI, Clause 2.

ment "taking" theory, the comprehensive language employed in *Munsey Trust Company* at 241, "nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation", would seem to preclude that basis for recovery.

Plaintiffs contend that the above cited cases did not place in issue the subject matter of the contracts. Thus, whether they involved "public works" was not considered by the court. It is argued that a public work, such as to deny liens [fol. 73] to laborers and materialmen, is one where title to the work rests initially with the Government, or is acquired by it as the work progresses. Plaintiffs refer us to *United States* v. *Ansonia Brass and Copper Co.*, 218 U.S. 452 (1910), in support of this assertion. In that case the Supreme Court had under review contracts for the construction of three vessels for the Federal Government. Creditors of the contractor there asserted liens under the supply-lien law of Virginia. A receiver was appointed by the state court and he took possession of the property of the contractor, including the three vessels. In its decision, the Court affirmed the Supreme Court of Appeals of Virginia's opinion that the state liens were superior to any claim or lien of the Government as to two of the vessels, but reversed that court's identical ruling as to the third vessel, holding that title to it passed to the United States under the terms of the contract providing for its construction. Plaintiffs read that case as disallowing state lien claims

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Statutes providing for payment bonds on Government contracts were no doubt enacted to furnish a bond obligation in place of that security which might otherwise be obtained by attaching a lien to the property. See *Equitable Surety Company* v. *McMillan*, *supra*, at p. 455; also *Hill* v. *American Surety Co. of New York*, *supra*.

The Act of August 24, 1935, 49 Stat. 793, 40 U. S. C. § 270a, commonly known as the "Miller Act," generally provides for a payment bond on a contract "for the construction, alteration, or repairs of any public building or public work of the United States." Acting under the authority of section 270e of that Act, the Secretary of Navy waived the bond requirement as to the instant contract. That section of the law allows waiver of the bond obligation "with respect to contracts for the manufacturing, producing, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, munitions, materiel, or supplies of any kind or nature for the Army or Navy, regardless of the terms of such contracts as to payment or title * * *".

upon property forming the basis of a Government construction contract *only* where the contract provides that title to the work is to pass to the Government as progress payments are made. They argue that where defendant under the contract merely reserves title to the construction materials, subject to transfer to the Government upon the contractor's default, as clause 11 (d) did here, subcontractors' statutory liens will attach to the materials before the Government exercises its right to acquire title. We cannot agree, however, that the *Ansonia* decision is to be so narrowly interpreted.[7]

In the recent case of *Thomson Machine Works Co.* v. *Lake Tahoe Marine Supply Co.*, 135 F. Supp. 913 (1955), it was held that an action would not lie to quiet title and [fol. 74] foreclose an alleged mechanics lien, provided under California law, upon certain propeller shafts supplied the prime contractor for the construction of utility boats under Government contract. There, upon the contractor's default, the Government acquired title to the shafts under a contract provision identical with the one we are here considering. The court made the following statements in reference to the import of the *Ansonia* decision [p. 915]:

> In the factual situation applicable to the Mohawk and the Galveston [two of the three vessels involved in the *Ansonia* case] the court held that the state lien law was applicable. The reasons for this holding, in

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[7] Apparent Congressional concern over the holding in the *Ansonia* decision was reflected in the enactment in 1911 of legislation giving the Government a paramount lien as to progress payments made in the construction of naval vessels. The statute, 34 U. S. C. § 582, in pertinent part reads as follows:

> "Partial payments during work. The Secretary of the Navy is authorized * * * to make partial payments from time to time during the progress of the work under all contracts made under the Navy Department for public purposes, but not in excess of the value of work already done; and the contracts made shall provide for a lien in favor of the Government, which lien is made paramount to all other liens, upon the articles or things contracted for on account of all payments so made * * *."

Substituted section 31 of the additional general provisions of the instant contract specifies this paramount lien in subsection (b).

this court's opinion, were twofold. *First, no provision was contained in the contracts for these vessels as to passing of title.* Secondly, the Supreme Court analyzed the entire contracts, and stated, "We think that this contract, as the one for the Mohawk, was made in recognition of the rights of those who should furnish work or material for the vessel to secure their claims by liens which it was made the duty of the contractor to provide for in order to protect the title of the United States." [Emphasis added.]

We think the district court's interpretation of *Ansonia* is sound. The Supreme Court in that case was faced with the problem of discovering the intent of the contracting parties. Looking to the agreement before us, it is obvious that defendant contracted for the completion of the vessels with a view to their later use in a legitimate governmental function. For this reason the contract included a clause for the vesting of title in the Government. Prior to completion of the vessels defendant acquired title to them and the materials to be used in their construction. This was done according to the provisions of the contract. As we interpret it, the contract provided the Government with inchoate title to the various materials supplied the contractor by petitioners. In this sense the contract embraced a "public work" which was beyond the reach of subcontractors' liens. *United States* v. *Mansey Trust Co., supra; Equitable Surety Co.* v. *McMillan, supra; Hill* v. *American Surety Company of New York, supra.* Absent the "property rights" which the [fol. 75] petitioners here claim, there was no basis for the Government's alleged taking.

Defendant's motion for summary judgment is granted, and plaintiffs' motion is denied. The plaintiffs' petition will be dismissed.

It is so ordered.

Laramore, Judge; Madden, Judge; and Whitaker, Judge, concur.

[fol. 77] *Filing of Plaintiff's motion for rehearing*

On February 13, 1959, plaintiffs filed a motion for rehearing.

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—May 13, 1959

This case comes before the court on plaintiffs' motion, filed February 13, 1959, for rehearing with respect to the court's decision of January 14, 1959. Defendant's opposition thereto was filed March 23, 1959, and plaintiffs' reply on April 2, 1959. Upon consideration thereof,

It Is Ordered this thirteenth day of May, 1959, that plaintiffs' motion for rehearing be and the same is denied.

By the Court, Marvin Jones, Chief Judge.

[fol. 79] Clerk's Certificate (omitted in printing).

[fol. 80] [File endorsement omitted]

IN THE UNITED STATES COURT OF CLAIMS

No. 532-56

CECIL W. ARMSTRONG, et al., Plaintiffs,

v.

THE UNITED STATES, Defendant.

EXHIBITS TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF—Filed April 10, 1958

Exhibits A thru I

Exhibit A

(See Opposite)

[fol. 81]

Standard Form 33
Prescribed by General Services Administration, Nov. 1949 Edition

AWARD
(SUPPLY CONTRACT)

CONTRACT NO. NObs 4572
ORDER NO. (If any)

PAGE NO. 1 | NUMBER OF PAGES OF AWARD 1

DATE OF AWARD: MAR 8 1954

INVITATION NO. 7324-S

TO (Contractor and address): Rice Shipbuilding Corporation
East Boothbay, Maine

ISSUED BY: Department of the Navy
Bureau of Ships
Washington 25, D. C.

INVOICE FOR PAYMENT SHOULD BE MAILED TO (in quadruplicate): Supervisor of Shipbuilding USN and Naval Inspector of Ordnance, Bath, Maine

PAYMENT WILL BE MADE BY: U.S. Navy Regional Accounts Office
Boston, Massachusetts

Your bid on the above numbered Invitation for Bids is hereby accepted as to the items enumerated below with the additions or changes made by you, which additions or changes are set forth in full below.

ITEM NO	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT
	This contract is made pursuant to the provisions of Section 714 (f)(2) of the Defense Production Act, as amended.				
	LOT II				
5.	40' Personnel Boat, Mark II, for dely to Norfolk, Va.	3		$16,200.00	$ 48,600.00
6.	40' Personnel Boat, Mark II, for dely to Brooklyn, N.Y.	3		$15,900.00	$ 47,700.00
7.	40' Personnel Boat, Mark II, for dely to Boston, Mass.	2		$15,800.00	$ 31,600.00
8.	40' Personnel Boat, Mark II, for dely to Philadelphia, Pa.	3		$16,000.00	$ 48,000.00
	INSPECTION: At Contractor's Plant, East Boothbay, Maine, by the Supervisor of Shipbuilding USN and Naval Inspector of Ordnance, Bath, Maine.				
	POINT OF ACCEPTANCE: AT POINT OF DELIVERY.				
	DELIVERY: As specified in the Schedule.				
	DMS CLASSIFICATION Class "A" Product.				
	CERTIFICATION DO-A3; certified under DMS Regulation #1.				
				TOTAL AMOUNT	$175,900.00

This Award consummates the contract, which consists of the following documents, including any Continuation Sheets hereto: (a) the Government's Invitation for Bids and your Bid, (b) the Schedule, (c) the General Provisions, and (d) the Government's Award. No further contractual document is necessary.

UNITED STATES OF AMERICA

BY _____

CONTRACTING OFFICER

Standard Form 33
Nov. 1949 Edition

Standard Form 36
Prescribed by General Services Administration, Nov. 1949 Edition

CONTINUATION SHEET
(SUPPLY CONTRACT)

CONTRACT (Applicable) / ORDER OR INVITATION NO.: No. 7324-S

PAGE NO.: 2

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number and unit)	UNIT	UNIT PRICE	AMOUNT
	LOT I				
1	40' Personnel Boat, Mark II Delivery Schedule: Transportation Charges Paid To: Puget Sound Naval Shipyard Bremerton, Washington Hull Numbers C-73959 and C-73960 are assigned to these boats.	2		$	$
2	40' Personnel Boat, Mark II Delivery Schedule: Transportation Charges Paid To: Mare Island Naval Shipyard Vallejo, California Hull Numbers C-73961 and C-73962 are assigned to these boats.	2		$	$

NAME OF BIDDER OR CONTRACTOR

Standard Form 36
Nov. 1949 Edition

[fol. 83]

Standard Form 36
Prescribed by General Services Administration, Nov. 1949 Edition

CONTINUATION SHEET
(SUPPLY SCHEDULE)

CONTRACT, ORDER, OR INVITATION NO. (As applicable) Inv. No. 7324-S

PAGE NO. 3

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT
	LOT I (Cont'd)				
3	40' Personnel Boat, Mark II Delivery Schedule: Transportation Charges Paid To: Puget Sound Naval Shipyard Bremerton, Washington Hull Numbers C-73963 and C-73964 are assigned to these boats.	2		$	$
4	40' Personnel Boat, Mark II Delivery Schedule: Transportation Charges Paid To: Long Beach Naval Shipyard Long Beach, California Hull Numbers C-73965 and C-73966 are assigned to these boats.	2		$	$
	TOTAL LOT I	8		-----	$
	LOT II				
5	40' Personnel Boat, Mark II Delivery Schedule: Transportation Charges Paid To: Norfolk Naval Shipyard Norfolk, Virginia Hull Numbers C-73967, C-73968 and C-73969 are assigned to these boats.	3		$	$
6.	40' Personnel Boat, Mark II Delivery Schedule: Transportation Charges Paid To: New York Naval Shipyard Brooklyn, New York Hull Numbers C-73970, C-73971 and C-73972 are assigned to these boats.	3		$	$

NAME OF OFFEROR OR CONTRACTOR

Standard Form 36
Nov. 1949 Edition

- Sthedule Page 3 over -

Standard Form 36
Prescribed by General Services Administration, Nov. 1949 Edition

CONTINUATION SHEET
(SUPPLY CONTRACT)

CONTRACT (Ar 42) I | ORDER OR MODIFICATION NO. No. 7324-S | PAGE NO. 4

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT
	LOT II (Cont'd)				
7	40' Personnel Boat, Mark II	2		$	$
	Delivery Schedule: Transportation Charges Paid To: Boston Naval Shipyard Boston, Massachusetts Hull Numbers C-73973 and C-73974 are assigned to these boats.				
8	40' Personnel Boat, Mark II	3		$	$
	Delivery Schedule: Transportation Charges Paid To: Philadelphia Naval Shipyard Philadelphia, Pennsylvania Hull Numbers C-73975, C-73976 and C-73977 are assigned to these boats.				
	TOTAL LOT II	11		- - -	$
	LOT III				
	Combination of Lots I and II	19		$	$
	Deliveries to start twelve months after award in accordance with the following Schedule:				

	12th Mo.	13th Mo.	14th Mo.	15th Mo.
Lot I - Item 1		2		
Lot I - Item 2				2
Lot I - Item 3	1	1		
Lot I - Item 4			2	
Lot II - Item 5	3			
Lot II - Item 6	1		2	
Lot II - Item 7				

NAME OF BIDDER OR CONTRACTOR

Standard Form 36
Nov. 1949 Edition

[fol. 85]

No. 7324-S

12th Mo. | 13th Mo. | 14th Mo. | 15th Mo.

Lot II - Item 8

3

METHOD OF DELIVERY: (The following provisions shall be considered a part of the specifications)

CONTRACTOR SHALL DELIVER THE BOATS IN ACCORDANCE WITH ANY ONE OR COMBINATION, AT THE CONTRACTOR'S ELECTION OF THE METHODS SHOWN BELOW AND THE FOLLOWING REQUIREMENTS:

ANY BOAT TO BE DELIVERED TO A DESTINATION MORE THAN 100 MILES FROM THE CONTRACTORS PLANT SHALL BE LOADED ON A RAILROAD FLAT-CAR OR FLAT-BED TRUCK OR TRAILER, OR TOWED BY OR DECKLOADED ABOARD A VESSEL FOR DELIVERY TO DESTINATION BUT SHALL NOT BE DELIVERED OVER THE ENTIRE DISTANCE UNDER ITS OWN POWER OPERATION OF THE VESSEL UNDER ITS OWN POWER OVER A PORTION OF THE ROUTE IS ALLOWABLE, PROVIDED THE DISTANCE THE VESSEL IS SO OPERATED DOES NOT EXCEED 100 MILES IN THE AGGREGATE

ANY VESSEL HEREUNDER TO BE DELIVERED TO A DESTINATION LESS THAN 100 MILES FROM THE CONTRACTOR'S PLANT, BY WATER, SHALL BE DELIVERED UNDER ITS OWN POWER, OR DECKLOADED ON A VESSEL, OR TOWED, OR LOADED ON A RAILROAD FLAT-CAR OR FLAT-BED TRUCK OR TRAILER.

ALL DELIVERY REQUIREMENTS, INCLUDING THOSE REQUIREMENTS SPECIFICALLY COVERED HEREIN SHALL BE PERFORMED IN ACCORDANCE WITH THE HIGHEST COMMERCIAL STANDARDS

THE CONTRACTOR SHALL NOT USE NOR PERMIT ANYONE TO USE, AS A TOWING VESSEL, ANY BOAT CONSTRUCTED UNDER THIS CONTRACT

THE GOVERNMENT MAY, AT ITS DISCRETION, UPON ARRIVAL OF THE BOATS AT THE DESTINATIONS AND PRIOR TO PRELIMINARY ACCEPTANCE, PERFORM ADDITIONAL TRIALS IN ORDER TO ASCERTAIN THAT NO DAMAGE OR DEFORMATION HAS OCCURED IN SHIPMENT

UPON ARRIVAL OF BOATS AT DESTINATION THE CONTRACTOR SHALL DELIVER THE BOATS TO THE GOVERNMENT IN THE FOLLOWING MANNER:

(1) FOR METHOD "A" OR "B" - IN THE WATER AT DOCKSIDE

(2) FOR METHOD "C" OR "D" - ON THE PIER

ny. No. 7324-S

METHOD "A"

IF ANY BOAT IS TO BE DELIVERED UNDER ITS OWN POWER THE CONTRACTOR SHALL:

1. Navigate and operate the Boat in accordance with good commercial practice.
2. Limit engine operating speeds to 1800 RPM or below.
3. Replace oil filters when the boat arrives at the destination.
4. Drain the lube oil and replace when the boat arrives at the destination.
5. Cradle not required.

METHOD "B"

IF ANY BOAT IS TOWED TO THE DESTINATION, THE CONTRACTOR SHALL:

1. Securely lock the boat s shaft and rudder in such a manner as to prevent motion, and take such other normal precautions as the Superviser considers necessary for the circumstances involved.
2. Not use nor permit any one to use, as a towing vessel, any boat to be constructed under this contract.
3. Tow the boats in accordance with good commercial practice.
4. Cradle not required.

METHOD "C"

IF ANY BOAT IS TO BE DELIVERED DECKLOADED ON ANOTHER VESSEL, THE CONTRACTOR SHALL:

1. Adequately cradle and secure the boat for shipment.
2. Prepare plans for cradle and stowage method, and submit such plans to the cognizant Supervisor of Shipbuilding for approval prior to shipment.

METHOD "D"

IF ANY BOAT IS TO BE DELIVERED BY RAIL OR TRUCK THE CONTRACTOR SHALL:

1. Adequately cradle and secure the boat for shipment.

- Schedule Page 7 over -

2. Prepare plans for cradle and stowage meth and submit such plans to the cognizant Supervisor of Shipbuilding for approval prior to shipment.

GOVERNMENT-FURNISHED PROPERTY: The Government shall furnish, in accordance with Article 30, "Government-Furnished Property", of the General Provisions, only the materials listed below for use under the contract, notwithstanding any requirements to the contrary for the furnishing of material by the Government which may appear in the contract plans and specifications. Any such requirements for the furnishing of materials by the Government appearing in the contract plans and specifications shall be of no force and effect and are superseded by the aforementioned list. Any and all materials required for the performance of the contract which do not appear on on this list shall be furnished by the Contractor.

In: No. 7328-S

The attached Standard Form 32, November 1949 Edition, General Provisions and Additional General Provisions (Advertised Supply Contract BuShips 10-1-53) form a part of this contract.

SAMPLES: Notwithstanding any statement in the specifications to the contrary, bidders are not required to furnish samples as a part of their bids.

PROGRESS PAYMENTS AND LIENS: Section 31 of the Additional General Provisions entitled "Withholding of Payments" is deleted and the following is substituted in lieu thereof:

(a) Payment of the total contract price shall be made as follows:

(1) The Department shall upon submission by the Contractor of invoices, certified by the Contractor as hereinafter provided, make payments up to ninety-seven percent (97%) of the total contract price in accordance with the provisions of this clause on the basis of progress in the completion of the performance of this contract as certified by the Naval Inspector. The Contractor from time to time as the work progresses, but not more frequently than twice a month, may submit invoices to the Naval Inspector for certification by him as to the percentage of completion of performance of the work hereunder. The amount of each such invoice shall not exceed that percentage of the contract price equal to the percentage of completion of performance of the contract, as so certified by the Naval Inspector, less any amounts previously billed for progress payments. Payments shall be made to the Contractor of ninety-seven percent (97%) of the net amount of each invoice so submitted and certified, provided that no such payments shall be made in an amount which, when added to all payments previously made, exceeds the costs certified by the Contractor on the related invoice plus five percent (5%) of such costs. If upon delivery and acceptance of all articles called for by this contract, ninety-seven percent (97%) of the total contract price has not been paid under this paragraph (1), any balance of such ninety-seven percent (97%) shall be paid upon submission of a properly certified invoice.

(2) Upon completion and final acceptance of all work required hereunder the balance due the Contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor. The Contractor and each assignee under an assignment in effect at the time of final settlement shall execute and deliver at the time of and as a condition precedent to final payment, a release in form and substance satisfactory to and containing such exceptions as may be found appropriate by the Contracting Officer, discharging the Government, its officers, agents and employees of and from all liabilities, obligations and claims arising under this contract. The Contracting Officer may authorize partial payments on account of any such balance to be made in advance of final settlement. If this contract shall have been terminated in whole or in part, any such release shall also contain such a release of all claims against the Government arising out of or by virtue of such termination.

nv. No. 7324-S

(b) Any and all progress payments made hereunder shall be secured, when made, by a lien in favor of the Government upon the vessels, articles, and things contracted for on account of all payments so made and on all material, equipment and other property acquired for or allocated to the performance of this contract, except to the extent that the Government, by virtue of any other provision of this contract, or otherwise, shall have valid title to such articles, things, materials, or other property as against other creditors of the Contractor. If such property is not identified by marking or segregation, the Government shall be deemed to have a lien upon a proportionate part of any mass of property with which such property is commingled. Any lien provided for by virtue of this Section is paramount to all other liens under the provisions of an Act approved August 22, 1911 (Pub. No. 41, 62nd Cong.; 37 Stat. 32; 34 U S.C. sec. 582).

(c) The Contractor, to the extent determined necessary and practicable by the Naval Inspector, shall identify by marking or segregation all property which is subject to a lien in favor of the Government by virtue of any provisions of this contract in such a way as to indicate that it is subject to such lien and that it has been acquired for or allocated to the performance of this contract. The Contractor shall also maintain adequate accounting control over such property on its books and records which shall be subject to examination by the Naval Inspector at all reasonable times to assure compliance with this provisions.

INSURANCE: (a) Until each boat has been preliminarily accepted by the Department, each boat and all materials, equipment and appliances therefor, including materials and equipment to be furnished by the Government to the Contractor for installation in each boat, shall, at the expense of the Contractor, be kept fully and duly insured by the Contractor in the names of the United States of America and the Contractor under form of Builders' Risk Insurance (Navy-Form-Syndicate) policy, including the rider attached to the "Free of Capture and Seizure" clause thereof where available. Where such insurance is not available the Contractor shall procure and thereafter maintain in the names of the United States of America and the Contractor, until each boat has been preliminarily accepted by the Department, fire and extended coverage insurance during construction and inland or ocean marine all risk cargo insurance during delivery with respect to each boat and all materials, equipment and appliances therefor, including materials and equipment to be furnished by the Government to the Contractor for installation in each boat. Where none of the foregoing insurance is available during water trials, the Contractor shall procure and thereafter maintain such other insurance for each boat as will cover the usual marine perils during such trials. The amount of the insurance shall not be less than the aggregate of the amounts paid to the Contractor under this contract by the Department plus the value of any materials, equipment and appliances furnished by the Government as determined from time to time by the Contracting

- Schedule page 11 over -

Officer. Loss under the aforementioned insurance shall be payable to the Secretary of the Navy, or order, for the use of the United States of America to the extent of payments made to the Contractor under this contract plus the amount of loss of or damage to the material, equipment and appliances furnished by the Government and for use of the Contractor to the extent of any remaining balance. Such insurance shall be procured from such domestic underwriters as may be approved by the Office of Naval Material, Insurance Branch, Department of the Navy.

(b) All policies shall be delivered to the Office of Naval Material, Insurance Branch, Department of the Navy, for its approval and custody. The terms of the policies, the insurance companies and the underwriters shall at all times be satisfactory to the Office of Naval Material, Insurance Branch. Policies not in conformance herewith shall be surrendered and cancelled upon the direction of the Office of Naval Material, Insurance Branch and new policies procured in conformance herewith.

(c) In the event that the Contractor shall procure or maintain other insurance upon any materials or other property upon which a lien exists in favor of the Government or to which the Government has title pursuant to the terms of this contract, the policy or policies shall contain a loss payable clause making losses payable to the Secretary of the Navy or Order. Any payments thereunder shall inure to the benefit of the Government to the extent of any loss suffered by the Government and to the Contractor as to any remaining balance. The provisions of this paragraph (c) shall not be deemed to require that the Contractor procure or maintain any such other insurance.

(d) The foregoing insurance requirements shall not be construed as limiting in any way the full responsibility of the contractor for the supplies under the contract, as provided in Section 6 of the General Provisions.

DISCHARGE OF LIENS: The Contractor shall immediately discharge or cause to be discharged any lien or right in rem of any kind, other than a favor of the Government, which at any time exists or arises with respect to the boats, and machinery, fittings, equipment or materials for the boats. If any such lien or right in rem is not immediately discharged, the Government may discharge or cause to be discharged said lien or right in rem at the expense of the Contractor.

PRELIMINARY ACCEPTANCE: Upon satisfactory completion of construction of the boats and of the applicable trial requirements in accordance with the plans and specifications and upon delivery, with all spare parts required, as provided in this contract, each boat shall be preliminarily accepted.

GUARANTY PERIOD: (a) The guaranty period under Section 34 of the General Provisions of this contract shall be six (6) months from the date of preliminary acceptance of each boat.

(b) Notwithstanding the provisions of Clauses 5 and 34 of the General Provisions, the liability of the Contractor under this contract for the correction or replacement of defective or non-conforming supplies (as "supplies" are defined in Article 5, "Inspection", of the General Provisions) delivered under this contract arising during the guaranty period (other than defects of non-conformities resulting from fraud or such gross mistakes as amount to fraud) shall be limited to a dollar amount equal to the result obtained by multiplying the total contract price by six percent (6%).

FINAL ACCEPTANCE: (a) Each boat and other articles to be furnished hereunder shall be finally accepted, upon the expiration of the guaranty period, if found by the Chief of the Bureau of Ships to conform with the plans and specifications.

(b) Final acceptance of the boats and other articles to be furnished hereunder shall be conclusive except as regards fraud or such gross mistakes as amount to fraud.

xxxxx

[fol. 97] Standard Form 32
Prescribed by General Services
Administration, Nov. 1949 Edition

GENERAL PROVISIONS

(Supply Contract)

5. INSPECTION

(*a*) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to final acceptance.

(*b*) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or corrected in place, as requested by the Contracting Officer, by and at the expense of the Contractor promptly after notice, and shall not again be tendered for acceptance unless the former tender and either the rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies, when requested by the Contracting Officer, and to proceed promptly with the replacement or correction thereof, the Government either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default." Unless the Contractor elects to correct or replace the supplies which the Government has a right to reject and is able to make such correction or replacement within the required delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price

shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(*c*) If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. If Government inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of the Government: *Provided*, That in case of rejection the Government shall not be liable for any reduction in value of samples used in connection with such inspection or test. All inspections and tests by the Government shall be performed in such a manner as not to unduly delay the work. The Government reserves the right to charge to the Contractor any additional cost of Government inspection and test when supplies are not ready at the time such inspection and test is requested by the Contractor. Final acceptance or rejection of the supplies shall be made as promptly as practicable after delivery, except as otherwise provided in this contract; but, failure to inspect and accept or reject supplies shall neither relieve the Contractor from responsibility for such supplies as are not in accordance with the contract requirements nor impose liability on the Government therefor.

(*d*) The inspection and test by the Government of any supplies or lots thereof does not relieve the Contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to final acceptance. Except as otherwise provided in this contract, final acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud.

(*e*) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the supplies hereunder. Records of all inspection work by the Contractor shall be kept complete and available to the Government during the performance of this contract and for such longer period as may be specified elsewhere in this contract.

6. RESPONSIBILITY FOR SUPPLIES

Except as otherwise provided in this contract, (i) the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated [fol. 98] delivery point, regardless of the point of inspection; and (ii) the Contractor shall bear all risks as to rejected supplies after notice of rejection.

7. PAYMENTS

The Contractor shall be paid, upon the submission of properly certified invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either $1,000 or 50 percent of the total amount of this contract.

* * * * * * *

11. DEFAULT

(*a*) The Government may, subject to the provisions of paragraph (*b*) below, by written Notice of Default to the [fol. 99] Contractor terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(*b*) The Contractor shall not be liable for any excess costs if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes unless the Contracting Officer shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(*c*) In the event the Government terminates this contract in whole or in part as provided in paragraph (*a*) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services. *Provided*, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(*d*) If this contract is terminated as provided in paragraph (*a*) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. The Government shall pay to the Contractor the contract price for completed supplies delivered to and accepted by the Government, and the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials de-

livered to and accepted by the Government and for the protection and preservation of property. Failure to agree shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(*e*) If, after notice of termination of this contract under the provisions of paragraph (*a*) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor pursuant to the provisions of paragraph (*b*) of this clause, such Notice of Default shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause. (*Except as otherwise provided in this contract, this paragraph (e) applies only if this contract is with a military department.*)

(*f*) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

12. DISPUTES

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive: *Provided*, That if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall pro-

ceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

. . . . . .

[fol. 100]

. . . . . .

[fol. 101] Additional General Provisions

. . . . . .

[fol. 102] 30. Government-Furnished Property

(a) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property which the Schedule or the specifications state the Government will furnish (hereinafter referred to as "Government-furnished Property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished Property of a type suitable for use will be delivered to the Contractor at the times stated in the Schedule or if not so stated in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-furnished Property is not delivered to the Contractor by such time or times, the Contracting Officer shall, if requested by the Contractor, make a determination of the delay occasioned the Contractor thereby, and shall grant to the Contractor a reasonable extension of time in respect of such delivery or performance dates. The Government shall not be liable to the Contractor for damages or loss of profit by reason of any delay in delivery of or failure to deliver any or all of the Government-furnished Property, except that in case of such delay or failure, upon the written request of the Contractor, an equitable adjustment shall be made in the delivery or performance dates, or price, or both, and in any other contractual provisions affected thereby, in accordance with the procedures provided for in the clause of this contract entitled "Changes."

(b) By notice in writing the Contracting Officer may decrease the property furnished or to be furnished by the Government under this contract. In any such case, upon the written request of the Contractor, an equitable adjustment shall be made in the delivery or performance dates, or

price, or both, and in any other contractual provisions affected by such decrease, in accordance with the procedures provided for in the clause of this contract entitled "Changes."

(c) Title to the Government-furnished Property shall remain in the Government. Title to Government-furnished Property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government-furnished Property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty. The Contractor shall maintain adequate property control records of Government-furnished Property in accordance with the provisions of the "Manual for Control of Government Property in Possession of Contractors" dated March 1951.

(d) The Government-furnished Property shall, unless otherwise provided herein, be used only for the performance of this contract.

(e) The Contractor shall maintain and administer, in accordance with sound industrial practice, a program for the maintenance, repair, protection and preservation of Government-furnished Property, until disposed of by the Contractor in accordance with this clause. In the event that damaged or defective Government-furnished Property is delivered to the Contractor, or any other damage occurs to Government-furnished Property the risk of which has been assumed by the Government under this contract, the Government shall replace such items or the Contractor shall make such repair of the property as the Government directs; provided, however, that if the Contractor cannot effect such repair within the time required, the Contractor may reject such property. The contract price includes no compensation to the Contractor for the performance of any repair or replacement for which the Government is responsible, and an equitable adjustment will be made in the contract price for any such repair or replacement of Government-furnished Property made at the direction of the Government. Any repair or replacement for which the Contractor is responsible under the provisions of this contract shall be accomplished by the Contractor at its own expense.

[fol. 103] (f) Unless otherwise provided in this contract, the Contractor, upon delivery to it of any Government-furnished Property, assumes the risk of, and shall be responsible for, any loss thereof or damage thereto except for reasonable wear and tear and except to the extent that such property is consumed in the performance of this contract.

(g) The Government shall at all reasonable times have access to the premises wherein any Government-furnished Property is located.

(h) Upon the completion of this contract, or at such earlier date as may be fixed by the Contracting Officer, the Contractor shall submit, in a form acceptable to the Contracting Officer, inventory schedules covering all items of Government-furnished Property not consumed in the performance of this contract (including any resulting scrap), or not theretofore delivered to the Government, and shall deliver or make such other disposal of such Government-furnished Property, as may be directed or authorized by the Contracting Officer. Recoverable scrap from Government-furnished Property shall be reported in accordance with a procedure and in such form as the Contracting Officer may direct. The net proceeds of any such disposal shall be credited to the contract price or shall be paid in such other manner as the Contracting Officer may direct.

(i) Directions of the Contracting Officer and communications of the Contractor issued pursuant to this Clause shall be in writing.

* * * * * * *

34. GUARANTY

Notwithstanding the provisions of Clause 5 of these General Provisions, entitled "Inspection", the Contractor guarantees that at the time of delivery thereof the supplies provided for under this contract will be free from any defects in material or workmanship and will conform to the requirements of this contract. Notice of any such defect or non-conformance shall be given by the Government to the Contractor within one year of the delivery of the defective

or non-conforming item, unless a different period of Guaranty is specified in the Schedule. If required by the Government within a reasonable time after such notice, the Contractor shall with all possible speed correct or replace the defective or non-conforming item or part thereof. When such correction or replacement requires transportation of the item or part thereof, shipping costs, not exceeding usual charges, from the delivery point to the Contractor's plant and return, shall be borne by the Contractor; the Government shall bear all other shipping costs. This Guaranty shall then continue as to corrected or replacing supplies or, if only parts of such supplies are corrected or replaced, to such corrected or replacing parts, until one year after the date of redelivery, unless a different period of Guaranty is specified in the Schedule. If the Government does not require correction or replacement of a defective or non-conforming item, the Contractor, if required by the Contracting Officer within a reasonable time after the notice of defect or non-conformance, shall repay such portion of the contract price of the item as is equitable in the circumstances.

. . . . . .

[fol. 104]

. . . . . .

[fol. 106]

EXHIBIT B

DEPARTMENT OF THE NAVY
BUREAU OF SHIPS
WASHINGTON 25, D. C.

(Emblem)

In Reply Refer to
NObs-3572(1718T)
Ser 1718-3714

REGISTERED

2-Aug 1955

Rice Shipbuilding Corporation
East Boothbay, Maine

Gentlemen:

Reference is made to the Government's telegram to you dated 20 July 1955 (confirmed by letter dated 22 July 1955),

notifying you that your performance under Contract NObs-3572 is in default due to your failure to deliver the vessels within the time specified in the contract, and due to your failure to make satisfactory progress in the prosecution of the work under the contract. You were requested to cure such default within ten days from receipt of the Government's telegram dated 20 July 1955, or to submit reasons, if any, why this contract should not be terminated for default.

Contract NObs-3572 provides for delivery of the vessels in accordance with the following schedule:

4 Vessels during March 1955
2 Vessels during April 1955
2 Vessels during May 1955
3 Vessels during June 1955

To date, however, only one vessel has been delivered. Moreover, on 25 March 1955 all work on Contract NObs-3572 was discontinued and has not been resumed.

Since you have failed to cure the default specified in the Government's telegram dated 20 July 1955 or provide any acceptable reason or basis why the contract should not be terminated for default, you are hereby notified that Contract NObs-3572 is terminated for default due to your failure to deliver the last ten vessels within the time specified in the contract and due to your failure to make satisfactory progress in the prosecution of the work under this contract. This termination is made pursuant to Clause 11 of the General Provisions of Contract NObs-3572.

The ten undelivered vessels under Contract NObs-3572 represent a firm requirement, and the Government intends to [fol. 107] exercise its rights under Clause 11(c) of the General Provisions of Contract NObs-3572 by having the undelivered vessels completed by another shipbuilder. You will be held liable for any excess costs incurred by the Government in having the vessels completed by another shipbuilder.

Pursuant to Clause 11(d) of the General Provisions of Contract NObs-3572 you are directed immediately to transfer to the Government (insofar as not previously trans-

ferred) title to the partially completed vessels and to such manufacturing materials, within the meaning of the contract, as shall be designated by the Supervisor of Shipbuilding, USN, Bath, Maine, and you are further directed to deliver to the Government, in such manner and at such times as shall be specified by the Supervisor of Shipbuilding, USN, Bath, Maine, said partially completed vessels and manufacturing materials. You are further directed to protect and preserve said vessels and manufacturing materials.

Sincerely yours,

J. B. DUVAL, JR.
Contracting Officer
Bureau of Ships

[fol. 108]

EXHIBIT C

Instrument of Transfer of Title Under Contract NObs-3572

WHEREAS, Contract NObs-3572, dated March 26, 1954, between RICE SHIPBUILDING CORPORATION (hereinafter referred to as the "Transferor") and the UNITED STATES OF AMERICA (hereinafter referred to as the "Transferee"), provides that, in the event that the Transferee terminates said contract pursuant to the provisions of the clause thereof entitled "Default", the Transferee, in addition to any other rights provided in said clause, may require the Transferor "to transfer title and deliver to the Government [i.e., Transferee], in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information and contract rights (hereinafter called 'manufacturing materials') as the Contractor [i.e., Transferor] has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated . . . "; and

WHEREAS, in the performance of that part of said contract NObs-3572 which, as noted below, has been terminated, the

Transferor has specifically produced or specifically acquired certain partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information and contract rights; and

[fol. 109] WHEREAS, by written Notice of Default dated 2 August 1955, the Transferor, pursuant to the said "Default" clause, terminated the whole of said contract NObs-3572; and

WHEREAS, the Contracting Officer, by such Notice of Default, directed the Transferor to transfer title and deliver to the Transferee "such manufacturing materials, within the meaning of the contract, as shall be designated by the Supervisor of Shipbuilding, United States Navy, Bath, Maine";

NOW, THEREFORE,

1. In compliance with the direction of the Contracting Officer, as aforesaid, the Transferor does hereby and by this instrument transfers to the Transferee all of the Transferor's right, title and interest in and to said manufacturing materials, within the meaning of the contract, as have been designated by the Supervisor of Shipbuilding, United States Navy, Bath, Maine.

2. The said manufacturing materials, within the meaning of the contract, which have been designated by the said Supervisor of Shipbuilding are more specifically described in Exhibit A, attached hereto and made a part hereof, but in the event of any conflict or inconsistency between said Exhibit A and the property constituting such manufacturing materials, within the meaning of the contract, or in the event that there is an omission from said Exhibit A of any property falling within the category of said manufacturing materials, within the meaning of the contract, nevertheless, notwithstanding any such conflict, inconsistency, or omission, the Transferor does hereby and by [fol. 110] this instrument transfers all of its right, title and interest in and to said manufacturing materials, within the meaning of the contract, as aforesaid.

Executed this 4th day of August, 1955, effective as of August 4, 1955.

RICE SHIPBUILDING CORPORATION

/s/ HENRY W. RICE
TREASURER
(Title)

EAST BOOTHBAY, ME.
(Address)

CERTIFICATE

I, Baxter M. Rice, certify that I am the Clerk of RICE SHIPBUILDING CORPORATION; that Henry W. Rice, who signed this Instrument of Transfer of Title on behalf of RICE SHIPBUILDING CORPORATION, was then Treasurer of said RICE SHIPBUILDING CORPORATION; that said Instrument of Transfer of Title was duly signed for and in behalf of said RICE SHIPBUILDING CORPORATION by authority of its governing body, and is within the scope of its corporate powers.

/s/ BAXTER M. RICE (Corporate Clerk)
(Signature)

[fol. 111]

EXHIBIT G

Enclosure 7 and it enclosures

DEPARTMENT OF THE NAVY
OFFICE OF THE
SUPERVISOR OF SHIPBUILDING, U. S. NAVY
AND NAVAL INSPECTOR OF ORDNANCE
BATH, MAINE

SupShip&InsOrd Bath
NObs-3572/L4/L6(41.1)SBW:jaw
Serial 356

JAN 24 1958

From: Supervisor of Shipbuilding, USN
and Naval Inspector of Ordnance

To: Chief, Bureau of Ships Code 161A

Subj: Contract NObs-3572; Rice Shipbuilding Corporation; Request for Data

Ref: (a) Phone conference of 21 January 1958; Mr. S. Suydam, BuShips calling CDR. J.L. Henderson, SupShip, Bath.

Encl: (1) Copy of Rice Shipbuilding Corporation invoice of 11 April 1955 in the amount of $426.80

(2) List of Progress payments

(3) Copies of progress work sheets and Rice Shipbuilding Corporation letters reporting costs

(4) Copy of BuShips letter NObs-3572 (1718T) Serial 1718-3714 of 2 August 1955 to Rice Shipbuilding Corporation

1. Data requested by reference (a) is forwarded herewith.

   a. Enclosure (1) is a copy of the last progress payment invoice. Payment of this invoice was made by Navy Regional Accounts Office 27 April 1955.

   b. Enclosures (2) and (3) include a listing of progress payments and the substantiating documents.

   c. Enclosure (4) is a copy of the termination notice.

159

/s/ J. L. Henderson,
J. L. Henderson
Acting

M C V

Nobs 3572

(Stamp)
Enclosures Received in 233

Italicized material handwritten.

[fol. 112] RICE SHIPBUILDING CORPORATION
East Boothbay, Maine

April 11, 1955

To UNITED STATES OF AMERICA
NAVY DEPARTMENT

CONTRACT No. NObs-3572
CONTRACT PRICE: ~~$175,900.00~~

Amount due for progress attained in the completion of 48' Personnel Boats, C-73967 to C-73977—

	Total to date	Prev. billed	Net amt. due		
Boat No. C-73967	$ 16,200.00	16,020.00	180.00	*5.40*	*174.60*
C-73968	15,900.00	15,900.00			
C-73969	15,100.00	15,100.00			
C-73970	14,000.00	13,970.00	30.00	*.90*	*29.10*
C-73971	13,040.00	13,010.00	30.00	*.90*	*29.10*
C-73972	12,670.00	12,660.00	10.00	*.30*	*9.70*
C-73973	12,460.00	12,460.00			
C-73974	11,950.00	11,760.00	190.00	*5.70*	*184.30*
C-73975	11,550.00	11,550.00			
C-73976	11,460.00	11,460.00			
C-73977	11,430.00	11,430.00			
	145,760.	*145,320.*	440.00	*13.20*	*426.80*

Payment request—ninety-seven percent of ~~net amount due~~ $426.80
13.20 reserve

CERTIFICATION

1. I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with; and that state or local sales taxes are not included in the amounts billed.

2. I certify that the insurance terms of the contract have been met.

Henry W. Rice
Treasurer

1718

Nobs 3572

MC√

Make payment of this invoice to assignee—The Pilgrim Trust Company, Boston, Massachusetts.

Italicized material handwritten.

Tabulation captioned "Rice Shipbuilding Corp., NObs 3572."

(See Opposite) ☞

RICE SHIPBUILDING CORP. NOBs 3572

C-73967 THRU C-73977

[fol. 113]

DATE OF INVOICE	DATE FORWARDED	EARNED TO DATE	GROSS PAYMENT	3% RESERVE	TOTAL RESERVE	NET PAYMENT	TOTAL PRIO
1 JUN 1950	21 JUN 1950	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
10 JUNE	23 JUNE	11860	6502	19506	35580	6306790	11[illegible]
25 JUNE	14 JULY	27250	15390	46170	81750	14928630	26[illegible]
10 JULY	19 JULY	34670	7420	22260	104010	7197740	33[illegible]
26 JULY	4 AUG	40730	6060	18780	122790	6272260	39[illegible]
10 AUG	18 AUG	49510	8780	26340	149130	8332260	47[illegible]
25 AUG	9 SEP	57296	7780	23340	171870	7581140	55[illegible]
10 SEP	21 SEP	65985	8690	26070	197940	8429130	64[illegible]
24 SEP	1 OCT	72410	6420	19260	217200	6232260	70[illegible]
11 OCT	19 OCT	77150	4740	14220	231420	6637380	76[illegible]
25 OCT	29 OCT	87480	10330	29490	260910	8505660	[illegible]
10 NOV	18 NOV	94070	6590	19770	[illegible]	6392230	91[illegible]
24 NOV	6 DEC	101940	7870	23610	305040	7638390	[illegible]
10 DEC	22 DEC	111020	9080	27240	332280	8815560	[illegible]
27 DEC	9 JAN 1951	115750	4730	14190	346470	4092210	112[illegible]
10 JAN 1951	17 JAN	122520	6770	20310	367080	6663300	118[illegible]
26 JAN	27 JAN	129040	6520	19560	387120	6327740	125[illegible]
10 FEB	16 FEB	132960	3920	11760	398880	3802240	129[illegible]
26 FEB	1 MAR	138720	3760	11280	410160	3647200	133[illegible]
1 MAR	3 MAR	139820	1110	3330	413490	3216700	135[illegible]
10 MAR	15 MAR	142860	3040	9120	422610	2739210	138[illegible]
26 MAR	29 MAR	146320	2960	8880	431490	2878620	141[illegible]
11 APR	16 APR	146760	440	1320	432810	(4260 00)	141[illegible]

Enclosures 10 and 11

v 4 "Progress Chart - Progress"

Yard No. -73967 68 69 70 71 72 73 74 75 76 77 78

Framing

| | | |

[fol. 115] April 11, 1955

From: Rice Shipbuilding Corporation

To: Supervisor of Shipbuilding, USN, and Naval Inspector of Ordnance, Bath, Maine

Subj: Contract NObs-3572; costs to April 11, 1955

Ref: S. B. Wood, Progress and Finance

1. We are submitting, as at April 11, 1955, for your attention, total costs on the above boats as follows:

Payrolls	$ 94,392.52
Purchased Materials	87,331.30
Overhead	16,611.41
	$198,335.23

RICE SHIPBUILDING CORPORATION

Henry W. Rice
Treasurer

$87,551.50
Boat No. 1— 8,050 —
$79,501.50—
÷ 10 =
Boats 2 thru 11—$7,950 each = 10—

HWR:PBM

Italicized material handwritten

[fol. 116]

EXHIBIT H

Enclosure 8

DEPARTMENT OF THE NAVY
BUREAU OF SHIPS
WASHINGTON 25, D. C.

(Emblem)

In Reply Refer to
NObs-3572(1718T)
Ser 1718-798

13 MAR 1957

Rice Shipbuilding Corporation
East Boothbay, Maine

Gentlemen:

Reference is made to the Government's letter dated 19 October 1956, notifying you that excess costs to the Government resulting from your default under Contract NObs-3572 would amount to not less than $116,142.94.

The ten undelivered vessels under Contract NObs-3572 have been completed by the New York Naval Shipyard, the Norfolk Naval Shipyard, and the Philadelphia Naval Shipyard. The ex s costs incurred by the Government as a result of your default under Contract NObs-3572 have been finally determined; they amount to $146,470.28.

Demand is hereby made for payment of excess costs in the amount of $146,470.28. This letter is also to advise you that the Government will amend its proof of claim presently filed with the U. S. District Court for the District of Massachusetts, sitting in bankruptcy, Case No. 622-55, to reflect the final determination of excess costs.

Sincerely yours,

E. H. Koch
Contracting Officer
Bureau of Ships

Dimaisi
Dimisi
Code 529 Burke
Mr. Stepp No 7990

[fol. 119] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 120]

SUPREME COURT OF THE UNITED STATES

No. 270, October Term, 1959

CECIL W. ARMSTRONG et al., Petitioners,

vs.

THE UNITED STATES.

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and the case is transferred to the summary calendar. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 270

CECIL W. ARMSTRONG, ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

Cecil W. Armstrong and Marie I. Armstrong, co-partners doing business as Armstrong Products Company

Baltimore Copper Paint Co., a division of Oliver Reeder and Son, Inc.

Orrin F. Benner, doing business as Thomaston Steel Works

Mason C. Carter

Chase Brass & Copper Co.

Columbian Bronze Corp.

Maurice W. Dennison, Thomas G. Lynah and Charles J. Winkler, Jr., Trustees doing business as Braman, Dow & Co.

The Dexolium Corporation

Heywood-Wakefield Company

E. F. Hutchinson, doing business as Ned's Garage

Kainer & Company

O. O. Keiver Lumber Corp.

Kennebec Wharf & Coal Company, a division of Staples Coal Company

Hiema J. Kuhls, Anna Kuhls Yates, Gladys Kuhls Woodel and Frieda Kuhls Woodel, co-partners doing business as H. B. Fred Kuhls

Le John Manufacturing Company

Marine Service Inc.

Marshall & Company, Inc.

Richardson, Dana & Co., Inc.

Alfred B. Sherman, doing business as Campbell-Built Products

The Southington Hardware Manufacturing Company

Surrette Storage Battery Co., Inc.

W. & J. Tiebout, Inc.
Kenneth M. Walbridge and Robert P. Walbridge, co-partners doing business as Walbridge Bros.
Wilcox-Crittenden Division of North & Judd Manufacturing Co.
Winde-McCormick Lumber Company.
Wickwire Spencer Steel Division, The Colorado Fuel and Iron Corporation
Maximilian P. Wurf, doing business as Transplastics Fabricating Co.,

Petitioners.

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

The petitioners respectfully request this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Claims dismissing the plaintiffs' petition.

THE OPINION BELOW

The Opinion of the United States Court of Claims in *Cecil W. Armstrong, et al.* v. *The United States*, No. 532-56, was rendered January 14, 1959, and is reported in 169 Federal Supplement at page 259. It has not yet been reported in the official Court of Claims volumes. A copy of the opinion is annexed hereto as Appendix I, pp. 1a-8a.

STATEMENT OF GROUNDS OF JURISDICTION

1. The judgment of the United States Court of Claims was rendered and entered on January 14, 1959.

2. Petition to the United States Court of Claims for rehearing was denied, without opinion, on May 13, 1959 (Appendix I, p. 9a).

3. This Court has jurisdiction pursuant to Sec. 1255, Title 28, United States Code.

QUESTIONS PRESENTED FOR REVIEW

1. Does the option given to the Government in the standard "Default" clause of a Government supply contract (in the event of a default termination of the contract) to "require the Contractor to transfer title and deliver to the Government" any completed supplies, partially completed supplies and manufacturing materials which the contractor has specifically produced or acquired for the performance of the contract give the Government "inchoate title" to all such items (before default) immediately upon their acquisition by the contractor?

2. Assuming arguendo that the Government acquires "inchoate title" to materials purchased by the contractor from suppliers upon delivery of the same to the contractor, does this "inchoate title" prevent suppliers from automatically acquiring liens (in accordance with the laws of the State of Maine) on these materials at the time of delivery of the materials to the contractor?

3. Assuming arguendo that liens are acquired by suppliers (in accordance with the laws of the State of Maine) on materials furnished to the contractor upon delivery, and assuming arguendo that the Government acquired "inchoate title" to the materials, are the liens

of the suppliers superior to the Government's "inchoate title"?

4. Where the Government enters into a supply contract for the purchase by it of small boats, which contract (a) provides for title to remain in the contractor during construction and until acceptance by the Government, (b) provides for the Government to have a lien on the said boats to the extent of any moneys it might advance, (c) requires the contractor to immediately discharge liens, and if the contractor fails to discharge said liens, gives the Government the privilege of discharging them at the contractor's expense, (d) makes no provision for payment or completion bonds and (e) grants the Government an option in the event of a default termination of the contract to require the contractor to transfer title to the Government to completed boats, uncompleted boats and manufacturing materials, are said boats a "public work"?

5. When the Government acquires title to boats and materials (situated in the State of Maine) on which there are liens and removes the said boats and materials to other states and effectively destroys the identity of the property, has the Government "taken" the liens within the purview of the Fifth Amendment entitling the lien creditors to just compensation?

STATUTES AND REGULATIONS RELIED ON

1. Constitution of the United States, Amendment 5:

> * * *; nor shall private property be taken for public use, without just compensation.

2. Section 13, Chapter 178, Revised Statutes of the State of Maine, 1954:

> Whoever furnishes labor or materials for building a vessel has a lien on it therefor, which may be

enforced by attachment thereof within 4 days after it is launched; but if the labor and materials have been so furnished by virtue of a contract not fully completed at the time of launching of the vessel, the lien may be enforced within 4 days after such contract has been completed. He also has a lien on the materials furnished before they become part of the vessel, which may be enforced by attachment; and the owners of any dry dock or marine railway used for any vessel have a lien on said vessel for the use of said dock or railway, to be enforced by attachment within 4 days after the last day in which the same is used or occupied by said vessel.

3. Armed Services Procurement Regulation, Section 8-707 (as revised to September 5, 1958):

8-707 Default Clause for Fixed-Price Supply Contracts. The following clause shall be used in all fixed-price supply contracts as defined in ASPR 7-102.

DEFAULT

(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, . . .

* * *

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. Payment for completed supplies delivered to and accepted by the Government shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Dispute."

STATEMENT OF THE CASE

The twenty-seven petitioners, suppliers and materialmen under a contract executed by the Department of the Navy and Rice Shipbuilding Corporation of East Boothbay, Maine, hereinafter called "Rice," brought this action to recover just compensation under the Fifth Amendment to the Constitution for property rights taken from them by the Government. Both the petitioners and the Government moved for summary judgment on the basis of the pleadings and papers filed

in conjunction with their motions. The Government's motion was granted and that of the petitioners denied.

Under date of March 26, 1954, the Department of the Navy awarded contract NObs-3572 to Rice to supply eleven 40-foot personnel boats which were to be constructed at Rice's plant at East Boothbay, Maine (Dft's. Ex. A). Rice was unable to complete the construction of the eleven boats, and on August 2, 1955, the Government terminated the contract for default (Dft's. Ex. B). On August 4, 1955, pursuant to the request of the Government's Contracting Officer, Rice executed an itemized "Instrument of Transfer of Title under Contract NObs-3572," which had been submitted to it by the Government (Dft's. Ex. C). This instrument transferred to the Government legal title to all the materials, supplies and hulls in the possession or control of Rice, which were incorporated or to be incorporated into the boats being constructed for the Government. Subsequently the Government took possession of the materials, supplies and hulls and removed them from the State of Maine for completion in its own yards in various states. Rice was subsequently adjudicated a bankrupt.

In acquiring title to the supplies and materials, the Government purported to act in accordance with Section 11(d) of the "Default" clause of the contract, which provided in part as follows (Dft's. Ex. A, General Provisions, p. 3):

> (d) If this contract is terminated . . . the Government . . . may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts,

tools, dies, jigs, fixtures, plans, drawings, information and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; * * *

During the performance of its contract, Rice received from the Government, from time to time, progress payments aggregating $141,387.20.[1] Pursuant to the terms of the contract, the Government acquired a lien on the work in process to the extent of such payments (Dft's. Ex. A, Sched. p. 11). The Government did not enforce this lien by foreclosure, and instead exercised its option under the "Default" clause by requesting Rice to give it title by executing the said "Instrument of Transfer of Title under Contract NObs-3572."

Each of the petitioners had furnished supplies, materials and equipment to Rice for use in the construction of the said boats. Pursuant to the provisions of Section 13, Chapter 178, of the Revised Statutes of Maine, 1954, each petitioner had a good and valid lien on the said boats and hulls, and on the materials and supplies furnished by each petitioner on the date of the transfer of title and possession of said hulls, materials and supplies to the Government. The petitioners have not been paid by Rice nor the Government, and there are no assets in the bankrupt estate to pay their claims.

The contract contained the following clause (Dft's. Ex. A, Schedule, p. 12):

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[1] Rice had an equity in the subject contract amounting to at least $57,158.03 at the time it delivered the "Instrument of Transfer of Title under Contract NObs-3572."

> DISCHARGE OF LIENS: The Contractor shall immediately discharge or cause to be discharged any lien or right *in rem* of any kind, other than a (sic) favor of the Government, which at any time exists or arises with respect to the boats, and machinery, fittings, equipment or materials for the boats. If any such lien or right *in rem* is not immediately discharged, the Government may discharge or cause to be discharged said lien or right *in rem* at the expense of the Contractor.

The petitioners alleged a "taking" by the Government of their property rights, that is, their liens, when the Government obtained title to the partially completed vessels and manufacturing materials, and subsequently removed them from the State of Maine, and effectively destroyed their identity. In granting the respondent's motion for summary judgment, the court below erroneously held that the petitioners did not have liens on the property in question because the project was a "public work."

The court below, relying on the "Default" clause, held that "the contract provided the Government with inchoate title to the various materials supplied the contractor by petitioners," and for this reason, the petitioners could not acquire a lien against the property, and thus had no property right that was "taken."

Because the court below decided the case solely on the basis of denying that the petitioners had valid liens because of the Government's "inchoate title," the ultimate question of petitioners' entitlement to just compensation was not reached.

JURISDICTION OF THE COURT BELOW

The United States Court of Claims had jurisdiction under section 1491 of Title 28, United States Code.

REASONS FOR GRANTING THE PETITION

1. The Decision Below is in Conflict With Applicable Decisions of This Court

Under the subject contract, title to each boat was to pass to the Government after delivery to specified Government installations and their acceptance by the Government (Dft's. Ex. A, face page). The contract further provided for the Government to make progress payments to the contractor for costs incurred up to a maximum of 97% of the total contract price with:

> Any and all progress payments made hereunder . . . secured, when made, by a lien in favor of the Government upon the vessels, articles and things contracted for . . . (Deft's. Ex. A, Schedule. p. 11).

Further, the contract required the contractor to discharge "any lien or right *in rem*" other than in favor of the Government, on the boats and materials therefor, with the Government having the right to discharge "such lien or right *in rem*" at the contractor's expense if the contractor failed to do so (Dft's. Ex. A, Schedule. p. 12). Rice was not required to furnish and did not furnish a payment bond to guarantee payment of laborers and suppliers.

Upon termination of the subject contract for default, the Contracting Officer requested Rice to execute and deliver an "Instrument of Transfer of Title Under Contract NObs-3572" transferring to the Government all of Rice's right, title and interest in the partially completed boats and manufacturing materials. Rice complied with the request. In the face of this fact and of the clear and unambiguous contractual language that the parties to the contract intended that the title to the boats and manufacturing materials would remain in

Rice until delivery to and acceptance by the Government, the court below (Appendix I, p. 8a) held that

> . . . the contract provided the Government with inchoate title to the various materials supplied the contractor by the petitioners. In this sense the contract embraced a "public work" which was beyond the reach of subcontractors' liens. * * *

In *United States* v. *Ansonia Brass and Copper Company*, 218 U.S. 452, this Court considered the relative rights of the Government and suppliers with respect to liens acquired by the suppliers under state law upon vessels under construction for the Government. While that case involved somewhat different issues than does the instant case, this Court, in reaching its decision, set forth certain principles, applicable herein, that were completely ignored in the decision below.

In the *Ansonia* decision, the Court interpreted three contracts for the construction of vessels for the Government, the Benyuard, the Mohawk and the Galveston. As to each vessel, suppliers had asserted claims under lien rights that had been upheld by the Virginia courts, and this Court was called upon to interpret the contracts to determine whether suppliers' liens could be enforced against the vessels and, if so, whether the Government's liens were prior in right thereto. The contract for the Benyuard contained a partial payment clause that provided for the vesting of *title* in the Government as partial payments were made, and this Court held that suppliers' liens could not attach to that vessel since it was the property of the Government. As to the Mohawk and the Galveston, the contracts provided for the Government to acquire *liens* to the extent of the progress payments that it made. As to these two vessels, this Court held that there was no basis

which precluded the suppliers from enforcing their liens against the vessels.

There are marked similarities between the contract for the Galveston and the subject Rice contract. Each provided that upon default termination, the Government could acquire title to the vessel and materials (Clause 13th of the Galveston contract, p. 230 of the Record in the *Ansonia* case). After setting forth the clause in the Galveston contract requiring the contractor to satisfy any liens, this Court concluded (at p. 475) that the contract "was made in recognition of the rights of those who should furnish work or material for the vessel to secure their claims by liens."

It is implicit in this Court's decision in the *Ansonia* case that liens accorded to suppliers, materialmen and laborers by state law can attach to supplies being manufactured for the Government where the Government does not have title to such supplies.[2] The court below misinterpreted the *Ansonia* decision in reaching a contrary result herein.

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[2] This Court referred (at p. 475) to an opinion of the Attorney General, 23 Op. Atty Gen. 174, 176, as strengthening its conclusion. The pertinent portion of the Attorney General's opinion states:

> I assume it to be correct to say that if a State law authorized a lien for labor or materials furnished in the construction of a vessel under this form of contract, it would not be void or unenforcible because the vessel was in process of construction for the United States, the property to the same not yet having passed to the Government, and such liens could therefore be effectively enforced. The clause of the contract referred to making it optional with the Secretary of the Navy to require evidence that no liens or rights *in rem* of any kind exist against said vessel imports that such is the opinion of the Navy Department.

It is significant that following the rendering of the decision by this Court in the *Ansonia* case, Congress saw fit to enact a statute that made the Government's lien for partial payments "paramount to all other liens." Act of August 22, 1911, Ch. 42, 37 Stat. 32, 34 U.S.C. 582, as codified in 10 U.S.C. 7521, August 10, 1956. This legislation was a tacit recognition by Congress that suppliers' liens might attach to property under construction for the Government, and the remedy enacted by Congress was to provide for the paramountcy of the Government's lien—*not to prohibit suppliers' liens from attaching to the vessels.* The subject contract contained, in the partial payment clause, a provision for the paramountcy of the Government's liens pursuant to the said statute.[3]

The decision of the court below also reached a result contrary to the holding of this Court in *Title Guaranty & Trust Co.* v. *Crane Co.*, 219 U.S. 24, 33, in concluding that there was a "public work" involved herein. The *Title Guaranty* decision has been interpreted in *United States for the use of Mengel Body Co., Inc.* v. *Metropolitan Body Co., et al.*, 79 F. 2d 177 (CCA-2, 1935), and in *Maiatico Construction Co., Inc.* v. *United States to the use of Phelps, et al.*, 79 F. 2d 418 (CA-D.C., 1935), as establishing that a work is "public" if title is in the Government, but "private" if title is not in the Government. Similarly, The Attorney General of the United States, on the authority of the *Title Guar-*

[3] The cited statute does not improve the Government's position herein since when it acquired title, its lien merged with its title (*Moral* v. *Dearborn*, 12 Gray (78 Mass.) 336, 337). Further, the equity of at least $57,158.03 which Rice had in the materials was lost to the petitioners when the Government acquired title in lieu of enforcing its lien rights, estopping the Government from now claiming it merely enforced its lien.

anty and the *Mengel Body* cases, *supra*, has interpreted the phrase "public work"[4] as including only work on vessels *belonging to the United States*, or work on vessels under contracts that "provide for *passage of title to the United States* during the progress of the work as partial payments are made." (38 Op. Atty. Gen., 418, 421 (1936). (Emphasis supplied.)

The decision below is thus inconsistent with the holdings of this Court in the *Ansonia* and the *Title Guaranty & Trust Co.* cases.

2. The Decision Below Has Deprived the Petitioners of Their Right Under the Fifth Amendment to Obtain Just Compensation for the Taking of Their Property

The right of the petitioners to their liens was a substantive property right under well established principles. *Louisville Bank* v. *Radford*, 295 U.S. 555, reh. den. 296 U.S. 661; *Security Bank* v. *Ridge Land Etc. Co.*, 85 F. 2d 557, 561 (C.C.A.-9, 1936) reh. den. 86 F. 2d 3, cert. den. 299 U.S. 613, reh. den. 300 U.S. 686. The right to retain a lien until the debt secured thereby is paid may not be taken from a creditor consistently with the Fifth Amendment. *Security Bank* v. *Ridge*, *supra*.

In holding that the petitioners had no "property rights" which were "taken," the court below deprived the petitioners of their constitutional right to just compensation. It is clear from this Court's decision in *United States* v. *Ansonia Brass and Copper Co.*, *supra*,

[4] The referenced opinion of the Attorney General was rendered in connection with a request as to whether a vessel was a "public work" within the meaning of the Miller Act, requiring payment bonds to be furnished by contractors where a "public work" is involved. In the instant case no payment bond was required by the Government.

that the petitioners did have property rights, the right to enforce their liens against the liened property. This right, given them by the Maine statute, was effectively "taken" by the sovereign when it acquired title and possession to the boats, hulls and materials, removed the same from the State of Maine and effectively destroyed the identity of the property.

With regard to the Fifth Amendment, this Court has said:

> The constitutional interest is addressed to every sort of interest the citizen may possess." *United States v. General Motors Corp.*, 323 U.S. 373, 378.

The court below did not face up to the constitutional issue involved in this case. It decided that no liens were acquired by the petitioners because the vessels involved were a "public work" (Appendix I, p. 8a). The court below stated (Appendix I, p. 5a):

> * * * While the Supreme Court has not been called upon to determine the question of whether subcontractors may obtain recovery against the United States under the Fifth Amendment "taking" theory, the comprehensive language employed in *Munsey Trust Company* [*United States v. Munsey Trust Co.*, 332 U.S. 234] at 241, "nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation", would seem to preclude that basis for recovery.

If, as the petitioners contend, they have valid liens, contrary to the view of the court below, this Court's decision in *United States v. Munsey Trust Co., supra*, would not be controlling in deciding the issue herein.

Presumably the court below is correct in stating that this Court "has not been called upon to determine the

question of whether subcontractors may obtain recovery against the United States under the Fifth Amendment 'taking' theory." The determination of the issue as to the entitlement of the 27 petitioners herein to obtain just compensation for the taking of their property is the only remaining remedy available to them.

Since this constitutional issue has never been decided by this Court nor the court below, it is appropriate that this Court decide the question at this time. The constitutional question is an integral part of this case and, for this reason alone, review by this Court is important and necessary.

3. The Decision Below Deals With an Important Question of Federal Contract Law That Has Not Been, But Should Be, Settled by This Court, Namely, Whether the Language of the Standard Termination for Default Clause Automatically Gives the Government "Inchoate Title" to Completed Work, Work in Process and Material to be Used in the Performance of the Contract Prior to Delivery to and Acceptance by the Government of the Completed Items

The decision below has interjected into the law pertaining to federal contracts a new and novel concept that the Government has a title interest in all supplies and materials in the possession of its contractors by reason of the standard "Default" clause. This concept, if permitted to stand, has a drastic and far-reaching effect on the legal relationships between the Government and its contractors and the legal relationships between all Government contractors and their creditors, secured as well as unsecured, their suppliers, subcontractors, sureties and financial institutions as assignees of the proceeds of a contract. The decision below also will create problems for the states and their

local Governments in determining the ownership of personal property for tax purposes.[5]

In a recent Congressional hearing[6] it was stated by Congressman F. Edward Hebert that "in fiscal years 1957 and 1958, the Government entered into 7,837,000 contracts costing $41 billion." With Government contracting being of this magnitude, it is apparent that the effect of the decision of the court below, if permitted to stand, will be to cause a multitude of problems with attendant litigation, to determine the rights of all those who contract with the Government and their suppliers and creditors.

Under the interpretation of the court below, a financing institution that lends money to a company secured by its materials inventory would risk losing its security if the debtor entered into a contract with the Government that contained the standard "Default" clause, even though only a small portion of production was devoted to the Government contract. What would be the rights of a supplier who delivers material to a Government contractor on consignment if the Government acquires "inchoate title" to the material as soon as it comes into the possession of the contractor? In the case of a manufacturer of commercial items who contracts with the Government to supply these same

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[5] Cf. *Westinghouse Electric Corp.* v. *State Tax Commissioner of Maryland*, (1955), 111 A. 2d 661, wherein the Maryland Court of Appeals held that property in the possession of a Government contractor was not subject to personal property taxes if the Government had title thereto, but was taxable if the Government had merely a lien for progress payments made by it.

[6] Inquiry into the Administration and Operation of the Armed Services Board of Contract Appeals; Hearing before the Subcommittee for Special Investigations of the Committee on Armed Services, House of Representatives, 85th Congress, 2nd Session. Hearing held December 4, 1958, p. 791.

items to the Government, how would it be possible to determine which of these items or their components were Government property? Assume that a contractor had fifty batteries on hand that could be used to complete a Government contract for an electronic end item, but that the contractor uses them to complete a commercial order, ordering an additional stock of batteries for the Government contract; has he converted Government property? When does the Government's "inchoate title" attach to materials in the stock bin of a manufacturer of commercial items?—when the contract is awarded?—when the contractor forms an intention to apply them to the Government contract?—when he moves them out of the bins to the production line?—when he places them in units?—or when he delivers them to the Government in finished items? Does the Government's "inchoate title" to the materials prevent the imposition of personal property taxes on these materials in the possession of a Government contractor where such tax is levied against the owner? May an attaching creditor levy on the materials upon which the Government has "inchoate title"? The practical difficulties resulting from the interpretation of the court below of the standard "Default" clause found in Government supply contracts (ASPR 8-707) are manifold and enormous.

In holding that the Government had "inchoate title," the court below cited no precedents for its decision. The phrase "inchoate title" is not defined by the court, and its exact legal meaning, as applied to personal property, is so indefinite as to result in more confusion than clarity if the decision is allowed to stand.[7] Aside

[7] The phrase "inchoate title" has been used by this Court with reference to grants of public lands. It appears to refer to the title held by one granted land by the sovereign, by legislative act,

from the immediate issues of this case, the decision has such far-reaching consequences that this Court should exercise its power of review.

CONCLUSION

The decision below is in conflict with the applicable decisions of this Court in *United States* v. *Ansonia Brass & Copper Co., supra*, and *Title Guaranty & Trust Co.* v. *Crane Co., supra*. It is also in conflict with the applicable decision of the two Circuit Courts on the question of what constitutes a "public work." The decision below has deprived the petitioners of their constitutional right to just compensation. Because of the importance of the decision below on the legal relationships of the Government and its contractors and their suppliers and creditors, the decision below should be reviewed by this Court. It is respectfully requested that the Court grant the petition.

Respectfully submitted,

SOLOMON DIMOND
Attorney for Petitioners
1011 New Hampshire Ave., N. W.
Washington 7, D. C.

Dated, August 3, 1959.

Of Counsel:

BURTON R. THORMAN

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proclamation or agreement, but which title has not yet been perfected by issuance of a patent or other actual instrument of conveyance. ". . . inchoate title to lands is property." *Delassus* v. *United States*, 9 Pet. 117, 133; *Rogers Locomotive Machine Works* v. *American Emigrant Co.*, 164 U.S. 559; *Chapman & Dewey* v. *St. Francis Levee District*, 232 U.S. 186; *Little* v. *Williams*, 231 U.S. 335; *Work* v. *Louisiana*, 269 U.S. 250. Our research does not indicate any previous usage of the term as applied to personal property.

APPENDIX I

Opinion of the United States Court of Claims

No. 532-56

(Decided January 14, 1959)

CECIL W. ARMSTRONG, ET AL.

v.

THE UNITED STATES

Mr. Burton R. Thorman for the plaintiffs. *Mr. Solomon Dimond* was on the brief.

Miss Kathryn H. Baldwin, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON DEFENDANT'S AND PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

JONES, *Chief Judge*, delivered the opinion of the court:

Petitioners were subcontractors under a contract executed with the Department of the Navy for the construction of military vessels. They bring this action to recover just compensation under the Fifth Amendment to the Constitution for property rights allegedly taken by defendant. Those rights consisted of statutory liens which plaintiffs claim were acquired under Maine law by reason of having provided materials and services in the construction of the vessels.

There appears to be substantial agreement between the parties as to the circumstances giving rise to plaintiffs' claim, and both parties have therefore moved for summary judgment.

In March 1954, defendant, acting through the Department of the Navy, entered into a contract for the construction of 11 personnel boats with the Rice Shipbuilding Cor-

poration of East Boothbay, Maine.[1] For this work defendant agreed to pay $175,900.

After performance of the contract had begun, defendant commenced to make progress payments to the contractor based upon the estimated percentages of the work completed, less 3 percent retained percentages. At the request of the Rice Shipbuilding Corporation, plaintiffs furnished it with supplies, materials, and equipment in connection with its performance of the Navy contract. It is alleged in the petition that amounts are due the plaintiffs as consideration for furnishing such materials and supplies, and for work, labor, and services performed in connection therewith.

In August 1955, the Rice Shipbuilding Corporation was notified by letter that defendant had terminated the contract for default because of Rice's failure to deliver the boats within the specified time and to make satisfactory progress in performance of the contract. The contractor was also informed that defendant would exercise its rights under clause 11 (c) of the contract and have the undelivered vessels completed by another shipbuilder, with the contractor held liable for any excess costs of completion. The final paragraph of the letter directed the contractor, pursuant to clause 11 (d) of the general provisions of the contract, to transfer title to the Government of the partially completed vessels and certain "manufacturing materials,"[2] and to deliver those vessels and materials in the

[1] Personnel boats of the type under contract were to be used aboard and in connection with the operation of combat vessels such as aircraft carriers, battleships, and cruisers.

[2] Clause 11 (d) of the contract's general provisions provided:

"11. Default.

"(d) If this contract is terminated as provided in paragraph (*a*) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer

manner and at the time specified by a designated representative of the Navy.

As a consequence, the contractor executed a document entitled "Instrument of Transfer of Title" by which it transferred to defendant all of the transferor's right, title, and interest in the "manufacturing materials" as specified by defendant. The Government thereafter removed these materials from Maine and delivered them to naval shipyards at New York, Philadelphia, and Norfolk where the boats were completed, the materials transferred being used in their construction.[3]

Prior to termination of the contract, defendant paid the Rice Shipbuilding Corporation $141,387.20 in the form of progress payments. The cost of completing the boats amounted to $166,627.34, exclusive of the materials transferred to defendant and subsequently used in the construction work. This added cost to the Government resulted in the assessment of "excess costs" against the contractor, determined by the contracting officer to be $146,470.28.

---

title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. The Government shall pay to the Contractor the contract price for completed supplies delivered to and accepted by the Government, and the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property. Failure to agree shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes'."

[3] When the contract was terminated, one vessel had been completed and delivered to the Government, and the remaining ten vessels were in various stages of completion.

Demand was made upon the contractor for payment of these excess costs. No part of this amount has been paid. The contractor, now adjudicated a bankrupt, did not appeal the termination of the contract or the assessment of excess costs.

Plaintiffs' case rests on the assertion that they acquired "good and valid" liens on the vessels and the materials furnished for their construction under section 13, chapter 178 of the Revised Statutes of Maine, 1954.[4] It was these liens which were allegedly taken by the Government when it obtained title to the partially completed vessels and manufacturing materials, and which were subsequently removed from Maine for completion elsewhere. The immediate question before us is thus whether plaintiffs had the "property rights" which they claim. If not, the Government has taken nothing.

It is Federal law, and not the law of a particular state, which governs the construction of contracts to which the United States is a party. *United States* v. *Allegheny County*, 322 U. S. 174 (1944). This principle is founded upon the supremacy clause of the Constitution of the United States,[5] which was designed to prevent the dis-

[4] Section 13, chapter 178, Revised Statutes of Maine, 1954, provides as follows:

"Whoever furnishes labor or materials for building a vessel has a lien on it therefor; which may be enforced by attachment thereof within 4 days after it is launched; but if the labor and materials have been so furnished by virtue of a contract not fully completed at the time of launching of the vessel, the lien may be enforced within 4 days after such contract has been completed. He also has a lien on the materials furnished before they become part of the vessel, which may be enforced by attachment; and the owners of any dry dock or marine railway used for any vessel have a lien on said vessel for the use of said dock or railway, to be enforced by attachment within 4 days after the last day in which the same is used or occupied by said vessel."

[5] Article VI, Clause 2.

parities, confusions, and conflicts that would ensue were the Federal authority subjected to state controls.

The Supreme Court on several occasions has stated in general terms that laborers and materialmen can acquire no lien on a Government work. *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 241 (1947); *Equitable Surety Co.* v. *McMillan*, 234 U. S. 448, 455 (1914); *Hill* v. *American Surety Company of New York*, 200 U. S. 197, 203 (1906). While the Supreme Court has not been called upon to determine the question of whether subcontractors may obtain recovery against the United States under the Fifth Amendment "taking" theory, the comprehensive language employed in *Munsey Trust Company* at 241, "nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation", would seem to preclude that basis for recovery.[6]

Plaintiffs contend that the above cited cases did not place in issue the subject matter of the contracts. Thus, whether they involved "public works" was not considered by the court. It is argued that a public work, such as to deny

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[6] Statutes providing for payment bonds on Government contracts were no doubt enacted to furnish a bond obligation in place of that security which might otherwise be obtained by attacking a lien to the property. See *Equitable Surety Company* v. *McMillan*, *supra*, at p. 455; also *Hill* v. *American Surety Co. of New York*, *supra*.

The Act of August 24, 1935; 49 Stat. 793, 40 U. S. C. § 270a, commonly known as the "Miller Act," generally provides for a payment bond on a contract "for the construction, alteration, or repairs of any public building or public work of the United States." Acting under the authority of section 270e of that Act, the Secretary of Navy waived the bond requirement as to the instant contract. That section of the law allows waiver of the bond obligation "with respect to contracts for the manufacturing, producing, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, munitions, material, or supplies of any kind or nature for the Army or Navy, regardless of the terms of such contracts as to payment or title * * *."

liens to laborers and materialmen, is one where title to the work rests initially with the Government, or is acquired by it as the work progresses. Plaintiffs refer us to *United States v. Ansonia Brass and Copper Co.*, 218 U. S. 452 (1910), in support of this assertion. In that case the Supreme Court had under review contracts for the construction of three vessels for the Federal Government. Creditors of the contractor there asserted liens under the supply lien law of Virginia. A receiver was appointed by the state court and he took possession of the property of the contractor, including the three vessels. In its decision, the Court affirmed the Supreme Court of Appeals of Virginia's opinion that the state liens were superior to any claim or lien of the Government as to two of the vessels, but reversed that court's identical ruling as to the third vessel, holding that title to it passed to the United States under the terms of the contract providing for its construction. Plaintiffs read that case as disallowing state lien claims upon property forming the basis of a Government construction contract *only* where the contract provides that title to the work is to pass to the Government as progress payments are made. They argue that where defendant under the contract merely reserves title to the construction materials, subject to transfer to the Government upon the contractor's default, as clause 11 (d) did here, subcontractors' statutory liens will attach to the materials before the Government exercises its right to acquire. We cannot agree, however, that the *Ansonia* decision is to be so narrowly interpreted.[7]

---

[7] Apparent Congressional concern over the holding in the *Ansonia* decision was reflected in the enactment in 1911 of legislation giving the Government a paramount lien as to progress payments made in the construction of naval vessels. The statute, 34 U. S. C. § 582, in pertinent part reads as follows:

"Partial payments during work. The Secretary of the Navy is authorized * * * to make partial payments from time to time during the progress of the work under all contracts made under the Navy Department for public purposes, but not in excess of

In the recent case of *Thomson Machine Works Co.* v. *Lake Tahoe Marine Supply Co.*, 135 F. Supp. 913 (1955), it was held that an action would not lie to quiet title and foreclose an alleged mechanics lien, provided under California law, upon certain propeller shafts supplied the prime contractor for the construction of utility boats under Government contract. There, upon the contractor's default, the Government acquired title to the shafts under a contract provision identical with the one we are here considering. The court made the following statements in reference to the import of the *Ansonia* decision [p. 915]:

> In the factual situation applicable to the Mohawk and the Galveston [two of the three vessels involved in the *Ansonia* case] the court held that the state lien law was applicable. The reasons for this holding, in this court's opinion, were twofold. *First, no provision was contained in the contracts for these vessels as to passing of title.* Secondly, the Supreme Court analyzed the entire contracts, and stated, "We think that this contract, as the one for the Mohawk, was made in recognition of the rights of those who should furnish work or material for the vessel to secure their claims by liens which it was made the duty of the contractor to provide for in order to protect the title of the United States." [Emphasis added.]

We think the district court's interpretation of *Ansonia* is sound. The Supreme Court in that case was faced with the problem of discovering the intent of the contracting parties. Looking to the agreement before us, it is obvious that defendant contracted for the completion of the vessels

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the value of work already done; and the contracts made shall provide for a lien in favor of the Government, which lien is made paramount to all other liens, upon the articles or things contracted for on account of all payments so made * * *."

Substituted section 31 of the additional general provisions of the instant contract specifies this paramount lien in subsection (b).

with a view to their later use in a legitimate governmental function. For this reason the contract included a clause for the vesting of title in the Government. Prior to completion of the vessels defendant acquired title to them and the materials to be used in their construction. This was done according to the provisions of the contract. As we interpret it, the contract provided the Government with inchoate title to the various materials supplied the contractor by petitioners. In this sense the contract embraced a "public work" which was beyond the reach of subcontractors' liens. *United States* v. *Munsey Trust Co., supra; Equitable Surety Co.* v. *McMillan, supra; Hill* v. *American Surety Company of New York, supra.* Absent the "property rights" which the petitioners here claim, there was no basis for the Government's alleged taking.

Defendant's motion for summary judgment is granted, and plaintiffs' motion is denied. The plaintiffs' petition will be dismissed.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* and WHITAKER, *Judge,* concur.

IN THE UNITED STATES COURT OF CLAIMS

No. 532-56

CECIL W. ARMSTRONG, ET AL.

v.

THE UNITED STATES

Order

This case comes before the court on plaintiffs' motion, filed February 13, 1959, for rehearing with respect to the court's decision of January 14, 1959. Defendant's opposition thereto was filed March 23, 1959, and plaintiffs' reply on April 2, 1959. Upon consideration thereof,

IT IS ORDERED this thirteenth day of May, 1959, that plaintiffs' motion for rehearing be and the same is denied.

BY THE COURT

MARVIN JONES
Chief Judge

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JAMES R. BROWNING, Clerk

No. 270

In the Supreme Court of the United States

OCTOBER TERM, 1959

CECIL W. ARMSTRONG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEO. B. LEONARD,
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In the Supreme Court of the United States

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No. 270

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-8a) is reported at 169 F. Supp. 259.

JURISDICTION

The judgment of the Court of Claims was entered on January 14, 1959. A timely motion for rehearing was denied on May 13, 1959 (Pet. App. 9a). The petition for a writ of certiorari was filed on August 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether state-created materialmen's liens were acquired with respect to property supplied a Government contractor for performance of a Government contract where, in accordance with the contract, title to the property was transferred to the Government upon termination of the contract for default.

STATEMENT

In March, 1954, the United States, through the Department of the Navy, entered into a contract with the Rice Shipbuilding Corporation, East Boothbay, Maine, for the construction of eleven personnel boats. The contract price for these boats was $175,900 (Pet. App. 1a-2a). The contractor commenced performance of the contract and, as the work progressed, the United States made progress payments to the contractor based upon estimated percentages of the work completed, less three percent retained percentages (Pet. App. 2a).

In August, 1955, the contractor was notified by letter that the United States had terminated the contract for default because of the failure to deliver the boats within the specified time and the failure to make satisfactory progress in performance of the contract.[1] The contractor was also informed that the United States would exercise its right under the contract to have the undelivered vessels completed by another shipbuilder, the excess costs of completion to be borne by the contractor. Finally, the contractor was, pursuant

[1] At the time of termination, one vessel had been completed and delivered to the Government, and the remaining ten vessels were in various stages of completion (Pet. App. 3a, n. 3).

to Clause 11(d) of the contract,[2] directed to transfer title to the Government of the partially completed vessels and certain manufacturing materials, and to deliver the vessels and materials to the Navy in the manner and at the time specified by the latter (Pet. App. 2a-3a).

The contractor on August 4, 1955, executed a document entitled "Instrument of Transfer of Title" by which the contractor's right, title and interest in the manufacturing materials were transferred as specified by the Government (Pet. App. 3a). The materials were thereafter removed by the Government from the State of Maine to naval shipyards at New York, Philadelphia, and Norfolk, where the materials were used in completing construction of the vessels (Pet. App. 3a).

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[2] Clause 11(d) provided as follows (App. 2a-3a):

If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. The Government shall pay to the Contractor the contract price for completed supplies delivered to and accepted by the Government, and the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property. Failure to agree shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

Prior to termination of the contract, progress payments in the amount of $141,387.20 were made by the United States to the contractor (Pet. App. 3a). After termination, the cost of completing the boats was $166,627.34, exclusive of the materials transferred from the contractor (Pet. App. 3a). The added cost of completion of the boats resulted in the assessment of "excess costs" against the contractor in the amount of $146,470.28, no part of which has been paid, the contractor having been adjudicated bankrupt (Pet. App. 3a-4a).

Petitioners are unpaid suppliers of materials and equipment which, at the request of the contractor, they furnished in connection with the contractor's part performance of the Navy contract (Pet. App. 1a-2a). Petitioners brought an action in the Court of Claims seeking "just compensation" for the alleged taking, by the United States, of property rights consisting of statutory liens (assertedly acquired under Maine law on the materials supplied the contractor for performance of the contract and transferred to and removed by the United States upon termination of the contract (Pet. App. 1a, 4a).

On cross motions for summary judgment, the Government's motion was granted and petitioners' was denied (Pet. App. 8a). Relying on the general rule that "laborers and materialmen can acquire no lien on a Government work" (Pet. App. 5a), the Court of Claims held (Pet. App. 4a, 8a) that petitioners had acquired no compensable property rights which had been taken by the Government. The court held (Pet. App. 6a) that, under the rule of *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452, the materialmen acquired no liens as against the United States

where, as here, the contract provided for passage of title to the Government upon the contractor's default. It rejected petitioners' contention that the rule prohibiting materialmen from acquiring liens on Government work is limited to cases where "title to the work rest[s] initially with the Government, or is acquired by it as the work progresses" (Pet. App. 5a-6a); and it ruled that, as it "interpret[ed]" "the provisions of the contract," the Government acquired "inchoate title" to the materials, and that "[i]n this sense the contract embraced a 'public work' which was beyond the reach of subcontractors' liens" (Pet. App. 8a).

ARGUMENT

Properly basing its decision on federal law (*United States* v. *Allegheny County*, 322 U.S. 174), the Court of Claims held that the subcontractors' liens, which might otherwise have arisen under Maine law[3] and which underlay petitioners' suits, did not and could not exist in the particular circumstances of this case, and that no valid claim under the Fifth Amendment was stated. The decision is correct and there is no con-

[3] Section 13, Chapter 178, Revised Statutes of Maine, 1954, provides as follows:

> Whoever furnishes labor or materials for building a vessel has a lien on it therefor, which may be enforced by attachment thereof within 4 days after it is launched; but if the labor and materials have been so furnished by virtue of a contract not fully completed at the time of the launching of the vessel, the lien may be enforced within 4 days after such contract has been completed. He also has a lien on the materials furnished before they become part of the vessel, which may be enforced by attachment, and the owners of any dry dock or marine railway used for any vessel have a lien on said vessel for the use of said dock or railway, to be enforced by attachment within 4 days after the last day in which the same is used or occupied by said vessel.

flict. There is no occasion for review by this Court.

In considering the validity of petitioners' materialmen's lien claims under Maine law, the Court of Claims was not dealing with the right of a state to provide for such liens where title to property supplied for the performance of a public contract is in the builder. The court, rather, was confronted with lien claims upon property to which the Government acquired title on August 4, 1955, when, pursuant to Clause 11(d) of the contract (*supra*, n. 2, p. 3), the prime-contractor executed the "Instrument of Transfer of Title" (Pet. App. 3a). It is, of course, settled that, for obvious reasons of public policy, property to which the Government has title "cannot be seized by authority of another sovereignty against the consent of the Government." *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452 at 471.

Consistent with this principle, this Court has on numerous occasions held that laborers or materialmen on Government contract projects cannot look to the United States for payment and can acquire no lien on a Government work.[4] The scope of the rule embraces new construction for the United States where actual title to parts and material does not vest in the Government until partial or progress payments are made or until there is a default by the contractor, as well as additions, repairs, or alterations of existing Government-owned property. *United States* v. *Ansonia Brass*, 218 U.S. 452, 470-471; cf. *United States* v. *Munsey*

[4] The governmental and public character of the subject matter of the Navy contract is hardly open to question. The personnel boats described in the contract were to be used aboard and in connection with the operation of combat vessels such as aircraft carriers, battleships, and cruisers (Pet. App. 2a, n. 1).

Trust Co., 332 U.S. 234, 241, 244; *Equitable Surety Co. v. McMillan*, 234 U.S. 448, 455; *Hall v. American Surety Company of New York*, 200 U.S. 197, 203.

In rejecting petitioner's state-created lien claims, the court below gave full force and effect to these principles and to the relevant decisions of this Court. Starting with the premise (Pet. App. 5a) that "nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation" (*United States v. Munsey Trust Co.*, 332 U.S. 234, 241), the court looked to the terms of the construction contract between the United States and the shipbuilder. The contract, in Clause 11 (d), *supra*, n. 2, p. 3, makes express provision for the transfer of title to the United States of parts and materials acquired for the performance of the contract upon the happening of stated events prior to completion and acceptance of the vessels. Thus, upon termination for default the Government may require the contractor "to transfer title and deliver to the Government, * * * supplies and materials * * * specifically acquired for the performance" of the contract.

This title provision of the contract negates any intention on the part of the United States to recognize state-created lien rights, and places this case on a common footing with the *Bonnyard* contract considered by this Court in the *Ansonia Brass* case, *supra*, 218 U.S. at 464-472. In the *Bonnyard* contract, title was to pass as partial payments in the progress of the work were made; here, title was to pass upon termination for default. In *Ansonia Brass*, the Court held that state-created suppliers' liens could not subsist with respect to the 70 percent complete *Bonnyard* because, under

the construction contract, the builder's title to parts and materials furnished by suppliers was divested in favor of the Government as progress payments were made in the process of construction.[5] 218 U.S. at 470-471. Under this holding, the same result must follow where, as the contract in this case provides, title is transferred to the United States upon termination for the contractor's default.[6] The Court of Claims correctly so held. *Thomson Machine Works Co.* v. *Lake Tahoe Marine Supply Co.*, 135 F. Supp. 913 (N.D. Calif.).[7]

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[5] Only that part of the Court's opinion in *Ansonia Brass*, *supra*, which treats with the *Benguard* contract is pertinent here. For only with respect to the *Benguard* did the Government have and assert a claim to title based upon the contract. With respect to the other two vessels—the *Mohawk* and the *Galveston*—the Court considered only lien provisions based upon partial payments prior to completion of the vessels. (218 U.S. at 472, 474). As a matter of interpretation, the Court construed those contracts as recognizing that state-created liens could attach, and held that the Government's contract liens were not paramount.

[6] Petitioners would, apparently (Pet. 11-12), restrict the *Ansonia* decision, insofar as it relates to the *Benguard*, only to instances where title has passed to the United States in accordance with a progress payments clause of a contract (see Pet. App. 6a). This, as the Court of Claims held (Pet. App. 6a), is an unduly narrow interpretation of *Ansonia*. It would be incongruous if the applicability of state-created lien laws were to depend upon the mechanical question of whether title has passed to the Government under a progress payments clause or pursuant to a termination clause of the contract.

[7] There is another ground upon which the decision below, that there has been no compensable taking in this case, may be sustained. Under Section 31(b) of the contract and 34 U.S.C. (1952 Ed.) 582 (Pet. App. 6a-7a, n. 7), the progress payments in the amounts of $141,387.20 made to the contractor gave rise to a lien in favor of the Government that is paramount to "all other liens" (34 U.S.C. (1952 Ed.) 582). Thus, even if petitioners acquired a lien on the material and vessels, it was subordinate to the Government's lien.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
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GEO S. LEONARD,
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JOHN G. LAUGHLIN, JR.,
Attorneys.

SEPTEMBER 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 270

CECIL W. ARMSTRONG, ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES OF AMERICA

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

In its opposition to the Petition for a Writ of Certiorari, the respondent (at page 8) has cited *Thomson Machine Works Co.* v. *Lake Tahoe Marine Supply Co.*, 135 F. Supp. 913 (N.D. Calif.). This case was also cited by the court below in its opinion (Pet. App. 7a). The *Lake Tahoe* case is inapplicable herein since it involved an action to quiet title and foreclose a mechanic's lien upon propeller shafts, title to which had been transferred to the Government under a default clause identical to the one in the Rice contract. In the *Lake*

Tahoe decision it was clearly stated that *until the right of the Government to acquire title upon default termination was exercised, the title to supplies acquired for the performance of the contract remained in the contractor.* The District Court stated (at p. 915):

> There is no question but that title to the propeller shafts was always in Tahoe. When Tahoe transferred title to the Government, title as to the vessels and materials vested in the Government.

Further, the court below erred in its reading of the *Lake Tahoe* decision insofar as that decision analyzed this Court's decision in *United States* v. *Ansonia Brass and Copper Co.*, 218 U.S. 452 (1910). The District Court had distinguished the partial payment provisions in the Mohawk and Galveston contracts (in the *Ansonia* case), saying "no provision was contained in the contracts for these vessels as to passing of title." The District Court could not have been referring to the complete contracts, for, as we pointed out (Pet., p. 12), there was a default clause in the Galveston contract (clause 13, appearing at p. 230 of the *Ansonia* record) which provided for passage of title to the Government in the event of default. The fact that there was a default clause in the Galveston contract as in the Rice contract has been overlooked by the Government, by the court below and by the United States District Court for the Northern District of California. If the decision below is allowed to stand, the erroneous interpretation of the *Ansonia* decision will be perpetuated.

The Government's brief has glossed over the fact that the decision below was predicated on the theory of the Government having "inchoate title" to supplies and materials in the possession of its contractor even

before the default clause came into operation. It has also ignored the fact that the default clause is in use in almost all Defense Department contracts. Both these points were discussed at length in our petition.[1]

The Government's failure to discuss the petitioners' third point, that the decision below deals with an important question of Federal contract law, must be considered as amounting to a tacit acquiescence as to the correctness of petitioners' argument on this point.

It is respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

SOLOMON DIMOND
Attorney for Petitioners

Of Counsel:

BURTON R. THORMAN

Dated: September 11, 1959

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[1] The Government's argument in its footnote 7 (p. 8) has been discussed in our petition (Pet., p. 13, fn 3). It may be observed that the decision below, although taking cognizance of the paramount lien provision, did not use defendant's argument as a basis for its decision. At the time Rice delivered to the Government the "Instrument of Transfer of Title under Contract NObs-3572," the materials and supplies delivered to the Government had a value, based upon costs incurred by Rice, of at least $57,158.03 more than the Government had advanced by way of progress payments; this was more than sufficient to pay all of petitioners' liens.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 270

CECIL W. ARMSTRONG AND MARIE I. ARMSTRONG, CO-PARTNERS DOING BUSINESS AS ARMSTRONG PRODUCTS COMPANY; BALTIMORE COPPER PAINT CO., A DIVISION OF OLIVER REEDER AND SON, INC.; ORRIN F. BENNER, DOING BUSINESS AS THOMASTON STEEL WORKS, et al, *Petitioners,*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

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v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE PETITIONERS

THE OPINION BELOW

The Opinion of the United States Court of Claims in *Cecil W. Armstrong, et al* v. *The United States,* No. 532-56, was rendered January 14, 1959 and is reported in 169 Federal Supplement 259. The Opinion is also set forth in the printed Transcript of Record herein at pages 18-24.

JURISDICTION

The judgment of the court below was entered on January 14, 1959 (R. 18) and petitioners' motion for rehearing was denied on May 13, 1959 without opinion (R. 25). Jurisdiction is conferred on this Court by Sec. 1255, Title 28, United States Code. Petition for a Writ of Certiorari was granted October 12, 1959 (R. 60).

STATUTES AND REGULATIONS RELIED ON

1. Constitution of the United States, Amendment 5:

> * * *; nor shall private property be taken for public use, without just compensation.

2. Section 43, Chapter 178, Revised Statutes of the State of Maine, 1954:

> Whoever furnishes labor or materials for building a vessel has a lien on it therefor, which may be enforced by attachment thereof within 4 days after it is launched; but if the labor and materials have been so furnished by virtue of a contract not fully completed at the time of launching of the vessel, the lien may be enforced within 4 days after such contract has been completed. He also has a lien on the materials furnished before they become part of the vessel, which may be enforced by attachment; and the owners of any dry dock or marine railway used for any vessel have a lien on said vessel for the use of said dock or railway, to be enforced by attachment within 4 days after the last day in which the same is used or occupied by said vessel.

3. Armed Services Procurement Regulation, Section 8-707 (as revised to September 5, 1958) 32 C.F.R. 8.707:

8-707 Default Clause for Fixed-Price Supply Contracts. The following clause shall be used in all fixed-price supply contracts as defined in ASPR 7-102.

DEFAULT

(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, . . .

* * *

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. Payment for com-

pleted supplies delivered to and accepted by the Government shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Dispute."

QUESTIONS PRESENTED

1. Does the option given to the Government in the standard "Default" clause of a Government supply contract (in the event of a default termination of the contract) to "require the Contractor to transfer title and deliver to the Government" any completed supplies, partially completed supplies and manufacturing materials which the contractor has specifically produced or acquired for the performance of the contract give the Government "inchoate title" to all such items (before default) automatically upon their acquisition by the contractor?

2. Assuming *arguendo* that the Government acquires "inchoate title" to materials purchased by the contractor from suppliers upon delivery of the same to the contractor, does this "inchoate title" prevent suppliers from acquiring liens (in accordance with the laws of the State of Maine) on these materials at the time of delivery of the materials to the contractor?

3. Assuming *arguendo* that liens are acquired by suppliers (in accordance with the laws of the State of Maine) on materials furnished to the contractor upon delivery, are the liens of the suppliers superior to the Government's "inchoate title"?

4. Where the Government enters into a supply contract for the purchase by it of small boats, are said boats a "public work", when the said contract (a) provides for title to remain in the contractor during construction and until acceptance by the Government, (b) provides for the Government to have a lien on the said boats to the extent of any moneys it might advance, (c) requires the contractor to immediately discharge liens, and if the contractor fails to discharge said liens, gives the Government the privilege of discharging them at the contractor's expense, (b) makes no provision for payment or completion bonds and (e) grants the Government an option in the event of a default termination of the contract to require the contractor to transfer title to the Government to completed boats, uncompleted boats and manufacturing materials?

5. When the Government acquires title to boats and materials, (situated in the State of Maine) on which there are liens and removes the said boats and materials to other states and effectively destroys the identity of the property and the right of the lienors to enforce their liens, has the Government "taken" the liens within the purview of the Fifth Amendment entitling the lien creditors to just compensation?

STATEMENT OF THE CASE

The twenty-seven petitioners, suppliers and materia men under a contract executed by the Department o the Navy and Rice Shipbuilding Corporation of East Boothbay, Maine, hereinafter called "Rice", brought this action to recover just compensation under the Fifth Amendment to the Constitution for property rights effectively and completely taken from them by the Government (Petition, R. 1-5). Both the peti-

tioners and the Government moved for summary judgment on the basis of the pleadings and papers filed in conjunction with their motions (R. 9, 13). The Government's motion was granted and that of the petitioners denied.

Under date of March 26, 1954, the Department of the Navy awarded contract NObs-3572 to Rice to supply eleven 40-foot personnel boats which were to be constructed at Rice's plant at East Boothbay, Maine (Dft. Ex. A, R. 27, *et seq.*). Rice was unable to complete the construction of the eleven boats, and on August 2, 1955, the Government terminated the contract for default (Deft. Ex. B, R. 47-49). On August 4, 1955, pursuant to the demand of the Government's Contracting Officer, Rice executed the "Instrument of Transfer of Title under Contract NObs-3572," which had been prepared and submitted to it by the Government (Dft. Ex. C, R. 49-51). This instrument, which contained a detailed itemized list of all of the materials, supplies and hulls in the possession or control of Rice, incorporated or to be incorporated into the subject boats, transferred legal title to the same to the Government.[1] Subsequently, the Government took possession of the materials, supplies and hulls and removed them from the State of Maine to its own yards in various other states (R. 10-12). Rice was subsequently adjudicated a bankrupt and the Government filed claim in the Bankruptcy Court for its alleged costs of completing the boats (Dft. Ex. H, R. 59).

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[1] Exhibit A to the "Instrument of Transfer of Title Under Contract NObs-3572" (not printed in the record) consists of a 23-page list of materials including the hulls of ten boats, in varying stages of completion, and lumber and marine hardware ranging from nuts, bolts and screws to rudders (Dft. Ex. C).

In acquiring title to the supplies and materials, the Government purported to act in accordance with Section 11(d) of the Default clause of the contract, which provided in part as follows (Dft. Ex. A, R. 42):

> (d) If this contract is terminated . . . the Government . . . may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as had been terminated; * * *

During the performance of its contract, Rice received from the Government various progress payments aggregating $141,387.20 (R. 11). The amount paid by the Government was based, in accordance with the terms of the contract, upon the percentage of completion of the contract less a retained reserve of 3% (R. 11, 35, 55). Rice's incurred costs in performing the contract, as of April 11, 1955, totalled $198,335.23 (R. 58).

Pursuant to the terms of the Progress Payments and Liens clause of the contract, the Government acquired a lien on the work in process solely to the extent of the progress payments it had made (R. 35-36). The Government did not enforce its lien by foreclosure, but instead exercised its option under the Default clause by requiring Rice to execute the said "Instrument of Transfer of Title Under Contract NObs-3572" (R. 47-51).

Each of the petitioners had furnished supplies, materials and equipment to Rice for use in the construction of the said boats (R. 14-15). Pursuant to the provisions of Section 13, Chapter 178, of the Revised Statutes of Maine, 1954 (*supra*, p. 2), each petitioner had a good and valid lien on the said boats and hulls, and on the materials and supplies furnished by each petitioner on the date of the transfer of title and possession of said hulls, materials and supplies to the Government. The petitioners have not been paid by Rice nor the Government, and there were no assets in the bankrupt estate with which to pay their claims (R. 16-17).

The contract contained a Discharge of Liens clause (R. 37) requiring the contractor to immediately discharge all liens except those in favor of the Government, failing which

> "the Government may discharge or cause to be discharged said lien or right *in rem* at the expense of the Contractor."

The petitioners alleged a "taking" by the Government of their property rights, that is, the right to enforce their liens, when the Government obtained title to the partially completed vessels and manufacturing materials, removed them from the State of Maine, and effectively destroyed their identity. In granting the respondent's motion for summary judgment, the court below erroneously held that the petitioners did not have liens on the property in question because the project was a "public work" (R. 24).

The court below, relying on the Default clause, held that "the contract provided the Government with inchoate title to the various materials supplied the contractor by petitioners," and for this reason, the peti-

tioners could not acquire a lien against the subject property, and thus had no property rights that were "taken" (R. 24).

SUMMARY OF ARGUMENT

I. The contract between the Government and Rice contains clear and unequivocal language establishing that it was the intention of the parties that the Government would not acquire title to the boats which were the subject of the contract until their delivery by Rice and their acceptance by the Government. The provision of the contract which gave the Government an option, in the event of termination of the contract for default, to require Rice to transfer to it title and possession of the uncompleted boats and materials did not give the Government "inchoate title" nor did it make the subject boats "public works". The decision of the court below that such clause prevented the petitioners from acquiring liens because of the Government's so-called "inchoate title" is in conflict with the decision in *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452. The term "inchoate title" is uncertain in meaning and its introduction into the law of federal contracts creates a host of problems affecting the legal relationships of all who contract with the Government. The court below had no statutory authority or precedent for the concept of "inchoate title", and its application to the instant case was unwarranted by the terms of the contract or any factual or equitable considerations.

II. The legal title to the uncompleted boats and materials was in Rice prior to the transfer of title and possession by Rice to the Government. Under Maine law, the petitioners, having supplied materials for the

building of vessels, acquired liens when they furnished the materials. Since the delivery of materials was a prerequisite to the Government making progress payments, the petitioners' liens were acquired prior to the time the Government acquired any liens and were encumbrances on the property when Rice executed the "Instrument of Transfer of Title . . .".

III. The lien of the Government for progress payments it made to Rice was merged with its title when the Government acquired title, since the Government exercised its option to acquire title under the provisions of the Default clause. Petitioners' liens, not having been extinguished, became paramount.

IV. When the Government acquired title to the partially completed boats and materials and removed them from the State of Maine, it destroyed the petitioners' rights to enforce their liens. The Government's option, contained in the Default clause, to acquire title did not affect the right of the petitioners to enforce their liens. The destruction of the petitioners' liens constituted a "taking" entitling the petitioners to just compensation under the Fifth Amendment to the Constitution.

ARGUMENT

I. NEITHER LEGAL TITLE NOR "INCHOATE TITLE" TO THE MATERIALS ACQUIRED BY RICE FROM THE PETITIONERS FOR PERFORMANCE OF ITS CONTRACT WITH THE GOVERNMENT WAS IN THE GOVERNMENT PRIOR TO THE EXECUTION OF THE INSTRUMENT OF TRANSFER OF TITLE BY RICE

The contract between Rice and the Government provided for delivery of the subject boats to various naval installations with acceptance "At Point of Delivery" (R. 27, 28-30). The Government had the right to perform trials after delivery and "prior to preliminary

acceptance" to determine if the boats had been damaged during shipment (R. 32). The contract also provided for final acceptance of the boats after a guarantee period of six months from the date of preliminary acceptance of the boats (R. 38). The inspection clause of the contract gave the Government the right to reject defective supplies at any time prior to final acceptance and thereafter, only if fraud was involved (R. 38, Final Acceptance clause; R. 40, Inspection clause (d)). The contract also had a provision (Responsibilities for Supplies clause, R. 41) which made the contractor responsible for all supplies until delivered to the Government and required the contractor to bear the risk as to rejected supplies.

The aforementioned clauses speak for themselves and establish the intention of the parties to the contract that the title to all materials and to the completed supplies, in the minimum, were in the contractor at all times prior to delivery and preliminary acceptance of the boats. While final acceptance was not to take place until after the expiration of a guaranty period of six months after preliminary acceptance, there was no requirement for the contractor to carry insurance for the benefit of the Government after the preliminary acceptance (R. 36). In any event, if title did not pass at the time of preliminary acceptance, it did pass at the time of final acceptance.

The only other way specified in the contract for the Government to acquire title, was the exercise by the Government of its option after a default termination to "require" the contractor to transfer title. This option was contained in the provisions of the Default clause, that in the event of a termination for default (Clause 11(d), R. 42):

> "the Government . . . may require the Contractor to transfer title and deliver to the Government . . . (i) any completed supplies, and (ii) . . . [manufacturing materials]."

The intention of the parties that title was to remain in the contractor is also evident from the language of the Progress Payments and Liens clause which provided in part (R. 36):

> "(b) Any and all progress payments made hereunder shall be secured, when made, by a lien in favor of the Government upon the vessels, articles, and things contracted for on account of all payments so made and on all material, equipment and other property acquired for or allocated to the performance of this contract, except to the extent that the Government, by virtue of any other provision of this contract, or otherwise, shall have valid title to such articles, things, materials, or other property as against other creditors of the contractor. If such property is not identified by marking or segregation, the Government shall be deemed to have a lien upon a proportionate part of any mass of property with which such property is commingled. Any lien provided for by virtue of this Section is paramount to all other liens under the provisions of an Act approved August 22, 1911 (Pub. No. 41, 62nd Cong.; 37 Stat. 32; 34 U.S.C. sec. 582)."

The contract further provided, under the provision entitled "Discharge of Liens" (R. 37):

> "The Contractor shall immediately discharge or cause to be discharged any lien or right *in rem* of any kind, other than a (sic) favor of the Government, which at any time exists or arises with respect to the boats, and machinery, fittings, equipment or materials for the boats. If any such lien or right *in rem* is not immediately discharged, the

> Government may discharge or cause to be discharged said lien or right *in rem* at the expense of the Contractor."

The fact that the Government was provided with a lien to secure any progress payments it might make was clear recognition that the Government did not have title to the materials acquired by the contractor. An owner cannot have a lien on his own property. *Litchfield* v. *Ballou*, 114 U.S. 190, 195; *Gould* v. *Day*, 94 U.S. 405, 413. The presence in the contract of a discharge of liens clause was in anticipation of the possibility that liens might be acquired by third parties against the boats and materials, a right which would not exist if the Government had title to them. *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 471.

The contract also required Rice to provide insurance for the benefit of the Government "until each boat has been preliminarily accepted", but only to the extent of the

> ". . . aggregate of the amounts paid to the Contractor under this contract by the Department plus the value of any materials, equipment and appliances furnished by the Government . . . . Loss under the aforementioned insurance shall be payable to . . . [the Government] to the extent of payments made to the Contractor under this contract plus the amount of loss of or damage to the material . . . furnished by the Government and for use of the Contractor to the extent of any remaining balance. . . ." (R. 36-37).

It is thus clear that in the event of destruction of all or part of the subject property, the Government's interest in the proceeds of the insurance was limited to the

extent of progress payments made by it and to the value of any Government-furnished property. Obviously, these limitations would not have been included had the Government had a title interest in all boats and materials in the contractor's possession, the conclusion reached by the court below.

In addition to the clearly expressed intention of the contract that title was to remain in Rice until the happening of certain events, (1) delivery and acceptance of the boats, or (2) a transfer of title upon the Government's request after a default termination, the action by the Government in requiring the contractor to execute an "Instrument of Transfer of Title . . ." when it terminated the contract (R. 47-49) is proof positive that the Government did not consider that the contract gave it any form of title. Clearly, if the Government had title to the manufacturing materials as they were acquired by Rice, it would not have been necessary for it to require Rice to execute an instrument transferring to the Government "all of the Transferor's right, title and interest in and to said manufacturing materials" (R. 50).

The question of title to vessels under construction for the Government and the materials therefor was the subject of this Court's decision in *United States* v. *Ansonia Brass & Copper Co., supra*, which decision is completely dispositive of both the question of title and of the right of petitioners herein to acquire their liens on the boats and materials. The case involved three contracts for the construction of vessels for the Government and the relative rights of the United States and others claiming liens on such vessels. The contracts were respectively for the construction of the dredge Benyuard for the War Department, the revenue cutter

Mohawk for the Treasury Department and the cruiser Galveston for the Navy Department. The creditors asserting liens under the supply-lien law of Virginia had secured the appointment of a receiver in a state court in Virginia to take possession of the property of the contractor including the three vessels. As to the three vessels and the materials therefor, the Supreme Court of Appeals of Virginia had held the creditors' liens superior to the lien or claim of the United States.

This Court reviewed the judgment of the state court. After considering the partial payment clause in the Benyuard contract, this Court concluded that under that clause "parts paid for are to become the sole property of the United States" (at p. 467). This Court held:

> "We are now dealing with the right of a State to provide for such liens while property to the chattel in process of construction remains in the builder, who may be constructing the same with a view to transferring title therein to the United States upon its acceptance under a contract with the Government. We are now treating of property which the United States owns." (At p. 471.)

The Court concluded that as to the Benyuard a state lien could not be impressed upon Government property.

Turning then to the other two vessels, the Court said:

> "In the case of the Mohawk there is no such stipulation as to passing of the title on partial payments in the progress of the work as is found in the contract for the Benyuard. The Secretary of the Treasury was, in his discretion, to make partial payments under the contract during the progress of the work. . . . and a lien was reserved for such payments. . . ." (At p. 472.)

* * *

"The case of the Galveston is controlled by the same principles. In that contract there was no provision for taking title to the vessel; on the contrary, it was stipulated that on certain conditions the title should vest in the United States as collateral security, and the eighteenth clause of the contract provides for the release of liens before partial payments shall be required. This clause . . . reads:

'When a payment is to be made under this contract, as a condition precedent thereto, the Secretary of the Navy may, in his discretion, require, for the protection of the party of the second part, evidence satisfactory to him, to be furnished by the party of the first part; that no liens or rights *in rem* of any kind against said vessel, or her machinery, fittings, or equipment, or the material on hand for use in the construction thereof, have been or can be acquired for or on account of any work done or any machinery, fitting, equipment or material already incorporated as a part of said vessel, or on hand for that purpose, or that such liens or rights have either been released absolutely, or so subordinated to the rights of the Government as to make its lien for all payments paramount, so as not to encumber or hinder in any way the right of the Government to accept or reject said vessel, and so as to become absolutely extinguished in case of acceptance of the vessel.'

"The effect which we give this provision is strengthened by the opinion rendered to the Secretary of the Navy by the Attorney General, that in his opinion the practice of the Navy Department in making such contracts recognized that liens of this class might be acquired on vessels where there was no provision in the contract for the vesting of title in the same in the United States. 23 Op. Atty. Gen. 174, 176.

> "We think that this contract, as the one for the Mohawk was made in recognition of the rights of those who should furnish work or material for the vessel to secure their claims by liens which it was made the duty of the contractor to provide for in order to protect the title of the United States." (p. 474-475.)[2]

While this Court in considering the Galveston contract did not expand upon its statement that title might vest in the Government under certain conditions, "as collateral security", a reading of that contract, set forth in Vol. 61, Transcripts of Records and File Copies of Briefs, October Term, 1910, Case No. 458, indicates the Court apparently had reference to Clause Thirteenth (p. 237-8 of that Record). That clause provided that in the event of termination of the contract the Secretary of the Navy might complete the vessel using materials on hand in which event

> "title to said vessel, or so much thereof as shall have been completed, and to all such materials shall forthwith vest in the party of the second part [Government]; and . . . [the contractor] will surrender said vessel and all materials on hand."

[2] In the cited opinion of the Attorney General, he had stated:

"I assume it to be correct to say that if a State law authorized a lien for labor or materials furnished in the construction of a vessel under this form of contract, it would not be void or unenforcible because the vessel was in process of construction for the United States, the property to the same not yet having passed to the Government, and such liens could therefore be effectively enforced. The clause of the contract referred to making it optional with the Secretary of the Navy to require evidence that no liens or rights *in rem* of any kind exist against said vessel imports that such is the opinion of the Navy Department."

The Rice contract had a comparable clause (Clause 11(d), R. 42) which provided the Government with an option, in the event of termination for default, to require Rice to "transfer title and deliver to the Government . . . completed supplies, and . . . manufacturing materials".

It is to be noted that the "release of liens" clause in the Galveston contract (as quoted at p. 16, *supra*) is comparable to the Discharge of Liens clause in the Rice contract (R. 37). This Court's decision, with respect to the Galveston and Mohawk contracts, was that suppliers could acquire liens upon vessels and materials to which the Government had not yet acquired title. The court below concluded that this aspect of the *Ansonia* decision was not a precedent in the instant case because Clause 11(d) (R. 42) of the Default clause gave the Government a title position which it did not have in the Galveston and Mohawk contracts. The court below apparently was not aware of the fact that the Galveston contract had a clause comparable to the Default clause and thus reached an improper conclusion.

It is significant that in the year 1911, in apparent recognition of the holding of this Court in the *Ansonia* case, legislation was enacted making the Government's liens for partial payments made by the Navy paramount to all other liens, Act of August 22, 1911, Ch. 42, 37 Stat. 32; 34 U.S.C. 582, as codified 10 U.S.C. 7521, August 10, 1956. Obviously, the legislation was enacted (1) in recognition of the fact that liens could be acquired on property being constructed for the Government, but on which property the Government did not have title, (2) to permit the Navy, if it wished, to make progress payments, and when so doing to protect itself

to the extent of the moneys advanced by it, by giving it a paramount lien to the extent of the moneys so advanced. This statutory provision is cited in the Progress Payments and Liens clause of the Rice contract (R. 36). Since it is well established that liens may not be filed against Government property, the need to provide for the paramountcy of Government liens would only be present if the Government did not have title.

It is obvious from the contract language and the conduct of the parties that they intended that the legal title to all materials, supplies and hulls was to remain in Rice until delivery and acceptance or until transfer of title pursuant to the Default clause.

The court below was also in error in concluding that the subject matter of the Rice contract involved a "public work". In *Title Guaranty & Trust Co.* v. *Crane Co.*, 219 U.S. 24, 33 Mr. Justice Holmes, speaking for the Court, stated:

> "Whether a work is public or not does not depend on its being attached to the soil; if it belongs to the representatives of the public, it is public . . ."

In that case, title was in the Government and therefore, a public work was involved.

The rule so succinctly stated by Mr. Justice Holmes was applied by the court in *United States for use of Mengel Body Co.* v. *Metropolitan Body Co.*, 79 F.2d 177, 178 (CCA-2, 1935). The court stated the facts and the applicable rule in the following language:

> "The use plaintiffs and interveners all furnished materials to the Metropolitan Body Company which went into the construction of the mail truck bodies and for which they have not been paid. Their case is based upon the claim that the con-

tract between the government and the Metropolitan Body Company was for the construction of 'a public work within the meaning of' . . . the Heard Act . . . so that the condition of the above-mentioned bond gave to them the security of the bond for the collection of payment for the materials they furnished.

* * *

"These mail truck bodies were at the risk of the builder and were its property during all the time they were being built. Not until they were completed, delivered f.o.b. cars at Bridgeport, Conn., and accepted by the government, did they become the property of the public. Before that the materials furnished had been built into the private property of the contractor which was as available for subjection to the satisfaction of the claims of these use plaintiffs and intervenors as any property of the debtor. When delivered and thereafter, the contractor's work was done and they were the property of the government without ever having been a public work.

"Granting that the bodies were a 'work' while work was being done upon them, the test laid down in the Title Guaranty & Trust Co. v. Crane Co., supra, made them a private work during that period. In this respect they differed from other property the government might buy only in that they were made to special order. * * *".

The Attorney General of the United States, citing the *Title Guaranty* and *Mengel Body* cases as authority, has interpreted the phrase "public work" as including only work on vessels belonging to the United States or work on vessels under contract that "provide for passage of title to the United States during the progress of the work as partial payments are made". 38 Op. Atty. Gen. 418, 421 (1936). See also *Maiatico*

Construction Co. v. *United States to use of Phelps, et al.*, 79 F.2d 418, 420 (C.A., D.C., 1935).

It was only by ignoring these precedents and the very clear language of the contract that the court below was able to reach its erroneous conclusion that the subject contract involved a "public work". There is no precedent for the lower court's opinion in this regard and indeed the court's opinion, if correct, results in the subject matter of practically every Government supply contract being a "public work", because they all generally include the standard "Default" clause which is contained in the instant case (Armed Services Procurement Regulation, Sec. 8-707; quoted pp. 2-4, *supra*).

The court below cited no precedent for its decision that the Government had "inchoate title" in the materials in the possession of Rice nor did it define the precise meaning or scope of the term. The phrase "inchoate title", has been used by this Court with reference to real property to describe the interest of one who has been granted land by the sovereign prior to the perfection of title by issuance of a patent or other actual instrument of conveyance. ". . . inchoate title to lands is property." *Delassus* v. *United States*, 9 Pet. 117, 133; *Rogers Locomotive Machine Works* v. *American Emigrant Co.*, 164 U.S. 559; *Chapman & Dewey* v. *St. Francis Levee District*, 232 U.S. 186, 198; *Little* v. *Williams*, 231 U.S. 335, 340; *Work* v. *Louisiana*, 269 U.S. 250, 255. In *Budd* v. *Gallier*, 50 Ore. 42; 45, 89 P. 638, 639 (1907), "Inchoate legal title" was defined as that title held by a purchaser of public land who had complied with all provisions of law required of him but had not received the formal document of title; he cannot be deprived thereof except for fraud or mistake. Our research did not disclose any

instance in which the term has been previously applied to personal property. Further, there does not appear to be an equitable reason under the circumstances for creating such a precedent.

Assuming, *arguendo*, that there is or should be such a concept as "inchoate title" as applied to personal property, the instant situation still does not lend itself to the application of the term. The term "inchoate title" suggests a title which requires steps to perfect but is otherwise complete. In short, the acquisition of legal title is of certain occurrence, but *in futuro*.

The Default clause required a series of steps to be taken before the Government acquired title; (1) a termination of the contract for default; (2) a decision by the Government to acquire title; (3) a demand that title be transferred; and (4) a transfer of title. As a condition precedent to the Government's acquisition of title under the Default clause, the contractor had to be in default and it was only upon the happening of that condition that the Government's option to acquire title came into effect. At that point the Government must decide whether it wishes to exercise the option and to take title. There are many instances in which the Government, for practical reasons, does not exercise the option, for the option carries with it the obligation upon the part of the Government to pay for the materials acquired by virtue of the exercise of the option.[3]

[3] Section 11 (d), the Default clause, provided in part (R. 42-43):

"The Government shall pay to the Contractor . . . the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials delivered to and accepted by the Government . . . Failure to agree shall be a dispute . . . within the meaning of the clause of this contract entitled 'Disputes'".

Assuming, *arguendo*, that the Government does have "inchoate title" to materials acquired by its contractors, it does not necessarily follow that this is the type of Government title which would preclude the filing of liens. If it were otherwise, there would be no necessity to provide for the Government to have a *paramount* lien for partial payments and no need to have a contract provision for the discharge of liens against the boats and materials. It is well established that an interpretation which gives a reasonable meaning to all provisions of a contract is preferable to one which leaves a portion of the writing useless and inexplicable. *Merrill-Rickgaber Co.* v. *United States*, 241 U.S. 387, 392; III Williston on Contracts (Rev. Ed.) sec. 619. It becomes apparent then, that in the contemplation of the parties when they entered into the contract, the interest of the Government in the boats and materials, whether it be designated "inchoate title" or any other name, was not of such nature as to preclude the petitioners acquiring liens thereon. It is a matter of elementary justice that the rights and remedies of lien creditors should not be cut off in the absence of a clear, legislative intent to do so.

The Default clause is standard in most Government contracts (Armed Services Procurement Regulations, Sec. 8-707, 32 C.F.R. 8.707, see pp. 2-4, *supra*) and the decision below on the issue of "inchoate title" will have substantial and far-reaching effects on all who contract with the Government, their suppliers, subcontractors, creditors, sureties and financing institutions. If, as the court below held, the language of the Default clause clothes the Government with "inchoate title" to materials acquired by its contractors, as soon as the materials come into the contractors' possession, anyone

dealing with a Government contractor would be doing so at his peril.[1] The situation would be particularly acute for a contractor who undertakes to supply commercial items he regularly manufactures to the Government. How would it be possible to determine what portion of his inventory of supplies would be subject to the Government's "inchoate title"? The question also arises as to when the Government's "inchoate title" becomes effective, if the contractor has a stock of parts, which may be used interchangeably for Government production and commercial production? If the manufacturer uses a portion of his inventory for his commercial production after being awarded a Government contract, is such action a conversion of Government property because of the Government's "inchoate title"? What are the rights of an attaching creditor, a secured creditor, a surety or an assignee with respect to these parts on which the Government has "inchoate title"? What is the status of a financial institution which made a loan to the contractor on the strength of its inventory statement?

This Court has been faced several times in recent years with the question of the right of the states, counties and municipalities to levy personal property and similar taxes upon property in the possession of Government contractors. Cf. *Detroit* v. *Murray Corp.*,

[1] "The magnitude of Government contracting was noted by Congressman F. Edward Hebert, in a recent Congressional hearing: 'In fiscal years 1957 and 1958, the Government entered into 7,837,000 contracts costing $41 billion.'" Inquiry into the Administration and Operation of the Armed Services Board of Contract Appeals, Hearing before the Subcommittee for Special Investigations of the Committee on Armed Services, House of Representatives, 85th Congress, 2nd Session, Hearing held December 4, 1958, p. 791.

355 U.S. 489, and the cases discussed therein. The introduction of the concept of "inchoate title" in the Government raises a host of new problems as to the power of the states to tax property.

The concept that the Government has "inchoate title" is implausible when it is considered that the Default clause entitles the Government to acquire from the contractor not only supplies and materials, but also "tools, dies, jigs, fixtures, plans, drawings, information and contract rights". While not pertinent to the issues herein, the "inchoate title" concept when applied to the tools, etc. used by a contractor raises another host of problems.

The practical difficulties resulting from the interpretation of the court below of section (d) of the standard Default clause found in Government supply contracts are manifold and enormous. The interpretation is contrary to this Court's views as expressed in the *Ansonia* case, *supra* (at p. 474). It is in accord with neither precedent, practicality, equity nor logic and to serve the ends of justice must be set aside.

The conclusion is inescapable from the terms of the subject contract and the surrounding circumstances that the title to the supplies and materials was in Rice, subject only to outstanding liens of the petitioners and the Government from the time Rice acquired them until Rice executed an Instrument of Transfer of Title. At that time, and not before, did title repose in the Government.

II. THE PETITIONERS HAD GOOD AND VALID LIENS UPON THE PROPERTY WHEN THE GOVERNMENT TOOK POSSESSION OF THE SAME

Section 13, Chapter 178 of the Revised Statutes of Maine, 1954, set forth at p. 2, *supra*, provides a supplier of labor or materials for building a vessel with a lien on the vessel and on the materials furnished before they become part of the vessel. The lien is enforceable by attachment brought within four days after launching of the vessel. The lien attaches to material furnished even though the material never became part of the vessel, if the parties contemplated that it was furnished to become part of a vessel. *Mehan* v. *Thompson*, 71 Me. 492 (1880).

The petitioners' liens became effective when they furnished Rice with the materials for use on the subject contract. The lien of the Government did not arise until progress payments were made, applying only to materials owned by the contractor. Since the acquisition of title to the supplies and materials by Rice was a prerequisite to an application by Rice for a progress payment, as a practical matter, the liens of the petitioners for the value of materials and services furnished by them to Rice, attached to the materials prior to the time the Government acquired its liens. Further, the Government's liens were limited to the amount of the funds which it advanced for progress payments. The Progress Payments and Liens clause provided, in effect, for partial payments based upon the percentage of completion of performance of the contract less a reserve of 3% (R. 35). Thus Rice, by April 11, 1955, had incurred costs of $198,335.23 (R. 58), but based upon a percentage of completion it became entitled to

partial payments of $141,387.20, which represented $145,760.00 earned, less a 3% reserve.[2]

The progress payments made by the Navy were not based upon Rice's costs but upon the Navy Inspector's estimate of the percentage of completion when applied to the contract price. Thus, if Rice had underbid by 50%, the Navy would make progress payments only to the extent of 50% of actual costs. Based upon the progress payments made to Rice, Rice had completed at least 82% of the contract at the time it defaulted. There is no relationship between the value of the partially completed vessels and materials taken by the Government and the amount of progress payments made to Rice by the Government. The Government had a lien on partially completed vessels and materials having a cost of at least $198,545.23 although it only advanced the sum of $141,387.20. Thus, at the time the Goverment took title, Rice had an equity in the subject materials amounting to at least $57,158.03. If the Government had enforced its lien rights rather than exercising its right to acquire title under the Default clause, any surplus available after the satisfaction of the Government's claim would have been available to the petitioners.

The decision of the court below dismissed a consideration of the statutory Maine lien by citing *United States* v. *Allegheny County*, 322 U.S. 174 as authority for the principle that Federal and not state law governs the construction of Federal contracts (R. 21). A reading of the *Allegheny* decision (at p. 183), makes it clear that this Court was, in effect, saying that where

[2] Additional materials were received and additional work was performed by Rice after April 11, 1955.

a conflict existed between state and Federal law as to the exercise of a constitutional function, Federal law would be controlling.

In *United States* v. *Standard Rice*, 323 U.S. 106, 111, this Court stated:

> "Although there will be exceptions, in general the United States as a contractor must be treated as other contractors under analogous situations. When problems of the interpretation of its contracts arise the law of contracts governs. *Hollerbach* v. *United States*, 233 U.S. 165, 171-172; *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 298-299. We will treat it like any other contractor and not revise the contract which it draws on the ground that a more prudent one might have been made *United States* v. *American Surety Co.*, 322 U.S. 96."

As between Rice and the petitioners, Maine law was applicable to the question of petitioners' lien rights. *Erie R. R.* v. *Tompkins*, 304 U.S. 64. There is no question of construction of the subject contract which creates a conflict between the Federal and Maine law. To the contrary, the contract by its terms recognized the possibility that such liens might arise and provided for their discharge (Discharge of Liens clause, R. 37) and for their subordination to the Government's liens for partial payments (R. 36).

Further, the cases cited by the court below in support of the proposition that laborers and materialmen can acquire no lien upon a Government public work (*United States* v. *Munsey Trust Co.*, 332 U.S. 234, 241; *Equitable Surety Co.* v. *McMillan*, 234 U.S. 448, 455; *Hill* v. *American Surety Company*, 200 U.S. 197, 203) are not applicable because the subject matter of this contract was not public work.

We have previously pointed out that the *Ansonia* decision, *supra*, recognized that state liens might attach to property being built for the Government when the Government does not have title but could not attach to property in which the Government had title (*supra*, pp. 15-17). We have also noted that Congress did not bar state liens against property upon which partial payments are made but merely made the Government's lien paramount (*supra*, p. 18). The conclusion reached by the court below that the petitioners could not acquire liens is not supported by the contract, by statute, by precedent nor by any equitable considerations.

The petitioners' liens were valid under Maine law and were in force and were encumbrances on the property at the time Rice executed the "Instrument of Transfer of Title . . .".

III. IF THE GOVERNMENT HAD A PARAMOUNT LIEN, ITS LIEN WAS MERGED WITH ITS TITLE WHEN IT ACQUIRED TITLE

After termination of the subject contract for default, the Government directed Rice to transfer to it title to the partially completed vessels and all materials acquired for use in connection with the subject contract in accordance with the provisions of Clause 11(d) of the Default clause (R. 48-49). This clause provided that in the event of termination of the contract for default:

> "the Government . . . may require the Contractor to transfer title and deliver to the Government . . . (i) any completed supplies, and (ii) such partially completed supplies and . . . [manufacturing materials] as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; . . .". (R. 42).

Pursuant to the Government's request, Rice executed an "Instrument of Transfer of Title under Contract NObs 3572" (R. 49-51). This instrument effectively transferred to the Government title to all partially completed vessels, materials and supplies which were the subject of the petitioners' liens. It is obvious that Rice could not and did not transfer title to the Government free and clear of the petitioners' liens. The petitioners' liens were not satisfied nor were they extinguished by any legal proceeding.

Upon the acquisition of title to the partially completed vessels and materials by the Government, its liens (arising by virtue of the progress payments made to Rice) merged with its title. It is well established that a person cannot have a lien in favor of himself on his own property; *Litchfield* v. *Ballou*, 114 U.S. 190, 195; *Gould* v. *Day*, 94 U.S. 405, 413; and that the inferior interest in a chattel "necessarily merges in that which is absolute and unconditional, when both are united and held by the same individual." *Moral* v. *Dearborn*, 12 Gray (78 Mass.) 336, 338 (1859).[6]

IV. THE DESTRUCTION OF THE PETITIONERS' LIENS BY THE GOVERNMENT CONSTITUTED A TAKING UNDER THE FIFTH AMENDMENT ENTITLING THE PETITIONERS TO JUST COMPENSATION

Following the execution of the "Instrument of Transfer of Title . . ." on August 4, 1955 (R. 49-51), the Navy removed the subject property from the State of Maine to Naval Shipyards in New York, Philadelphia and Norfolk (R. 10-11). The boats were allegedly

[6] Cf. *Hinckley* v. *Johnson, State Tax Assessor*, 153 Me. 517, 529, 138 A. 2d 463, 465 (1958) a tax case wherein the retention of a shipbuilder's lien under the Maine statute was held inconsistent with a claim of the tax assessor that the same shipbuilder held title

completed at these Naval shipyards and, while much of the material was probably incorporated into the boats, there is some evidence that not all the materials were so used (R. 11). It would be extremely difficult, if not impossible, to trace and establish the ultimate disposition of each and every one of the items[7] which were removed by the defendant from the State of Maine and which items were subject to the petitioners' liens.

Upon the acquistion of title by the Government and the removal of the uncompleted vessels, supplies and materials from the State of Maine by the Government, the petitioners were divested of their liens. *Thibodo* v. *United States*, 187 F.2d 249, 254 (C.A. 9, 1951).

Under the Maine statute, the petitioners had liens on each vessel enforceable "by attachment within four days after it has been launched"; and on the materials furnished before they became part of the vessel "which may be enforced by attachment". Upon the taking of title by the Government and the removal of the uncompleted vessels and materials from the State of Maine, the "doors to recovery" on the liens were foreclosed to the petitioners. *Thibodo* v. *United States*, *supra*, at p. 254. The *in rem* remedy provided by the Maine statute and recognized by the Government in the subject contract (Discharge of Liens clause, R. 37) was no longer available to the petitioners. This was so, first, because it now seems well settled than an *in rem* proceeding against property to which the Government has title is not permitted because of the sovereign's immunity from suit, *United States* v. *Alabama*, 313 U.S. 274, 282; and second, because the removal of the uncompleted vessels and materials from the State of

[7] See footnote 1, supra.

Maine and the loss of their identity destroyed the petitioners' rights to enforce their liens.

> "The peculiar advantages which it [the Maine Statute] affords to a lien claimant . . . . that he may resort to the vessel on which the labor was performed, or for which the materials were furnished, without regard to . . . ownership . . ." *Scudder v. Balkam*, 40 Me. 291, 292-3 (1855).

were effectively taken from the petitioners by the Government's acts.

In the instant case, the Government provided no fund from which the claims of any lien holders could be satisfied. The *res* was removed from the State of Maine, its identity destroyed and no fund was provided to which the lien holders could look for satisfaction of their liens.

There can be no doubt that a lien on property is a valuable and substantive property right. *Louisville Bank v. Radford*, 295 U.S. 555, reh. den. 296 U.S. 661; *Security Bank v. Rindge*, 85 F.2d 557, 561, (C.C.A.-9, 1936), reh. den. 86 F.2d 3, 107 A.L.R. 1240, cert. den. 299 U.S. 613, reh. den. 300 U.S. 686. The right to retain the lien until the debt secured thereby is paid may not be taken from the creditor consistently with the Fifth Amendment. *Security Bank v. Rindge*, *supra*. It has been said that the word "property" is to be broadly construed for "The constitutional provision is addressed to every sort of interest the citizen may possess." *United States v. General Motors*, 323 U.S. 373, 378; Cf. Developments of the Law—Remedies against the United States, 70 Harv. L.R., 827, 879.

When the Government acquired title to the *res* and removed it from the State of Maine, providing no fund

for payment of the petitioners' liens, it "took" the petitioners' liens. Regardless of the option in the Government created by the contract to require Rice to give the Government title, the contract did not destroy the existing liens. On the one hand the Government was enforcing its option as a contracting party to acquire title, but it was in its sovereign capacity that it destroyed the right of enforcement of the liens. It is well established that when the Government enters into contracts, its rights and duties are governed by law applicable to private contracts. *Lynch* v. *United States*, 292 U.S. 571, 579. *United States* v. *Standard Rice*, *supra*.

As a contracting party, the Government had no right to take property free of the liens created by state statute. Its sole contract right to any priority status was in the progress payments clause. The Government's right to enforce its paramount lien was lost when it acquired title. The Government's actions in depriving the petitioners of their liens was the act of the sovereign. It is for this "taking" of their liens that the petitioners are entitled to just compensation.

In *Thibodo* v. *United States*, *supra*, it was stated that the plaintiff whose liens were rendered unenforceable by the Government's acquisition of land could:

> ". . . state his claim for relief based upon a deprivation of constitutional rights, by virtue of the 'taking' of his right to have his bonds discharged through foreclosure of the lien upon the land." (at p. 257).

The petitioners have been deprived by the Government of their right to have their liens satisfied through attachment of the materials, supplies and vessels.

It is no answer to the petitioners' argument to state, as the Government did in the court below, that the Government gained nothing by the "taking" because it incurred large sums in completing the contract. It is well established that the criterion for determining just compensation is the owner's loss. As stated by this Court in *United States* v. *Causby*, 328 U.S. 256, 261:

> "It is the owner's loss not the taker's gain, which is the measure of the value of the property taken. *United States* v. *Miller*, 317 U.S. 369."

In *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 123, the Court said:

> "It is the property and not the cost of it that is protected by the Fifth Amendment."

As a practical matter, the Government was unjustly enriched at the expense of the petitioners, for the contractor's equity of $57,158.03 in the property (*supra*, pp. 26-27) was more than sufficient to pay the $23,732.72 claimed by petitioners (R. 5).

The Government has deprived the petitioners of their property rights. There are no remedies available to the petitioners other than the protection afforded them by the Fifth Amendment. It has been said that:

> ". . . where federally protected rights have been invaded, it has been the rule from the beginning that the courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684.

CONCLUSION

The provisions of the Rice contract make it clear that the title to the uncompleted boats and materials were in Rice until it transferred title to the Government. Until the transfer of title was made, the sole title interest of the Government in the uncompleted boats and materials was its lien for the progress payments it had made. The petitioners had liens on the uncompleted boats and materials under a law of the State of Maine. When the Government acquired title to and possession of the uncompleted boats and materials from Rice, the Government made no provision for discharging or satisfying petitioners' liens. The action of the Government deprived the petitioners of their property rights (liens) and they are entitled to just compensation therefor.

It is respectfully requested that the judgment of the court below be reversed and that the court be directed to enter judgment for the petitioners in the amount which it determines is due to each petitioner.

Respectfully submitted.

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Dated, January 29, 1960

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No. 270

In the Supreme Court of the United States

OCTOBER TERM, 1959

CECIL W. ARMSTRONG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 18–24) is reported at 169 F. Supp. 259.

JURISDICTION

The judgment of the Court of Claims (R. 24) was entered on January 14, 1959. A timely motion for rehearing was denied on May 13, 1959 (R. 25). The petition for a writ of certiorari was filed on August 3, 1959, and granted on October 12, 1959 (R. 60). The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether materialmen's liens claimed under State law with respect to materials and supplies furnished a contractor for performance of a Government contract subsisted when, in accordance with the contract, title to the property was transferred to the Government upon termination of the contract for default.

2. Whether, assuming the above question is answered in the affirmative, there was any compensable "taking" by the United States of petitioners' materialmen's liens.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Constitution of the United States, Amendment 5, provides, in relevant part, as follows:

> * * *; nor shall private property be taken for public use, without just compensation.

2. Act of August 22, 1911, ch. 42, 37 Stat. 32, 34 U.S.C. (1952 ed.) 582, provides as follows:

> The Secretary of the Navy is authorized in his discretion, to make partial payments from time to time during the progress of the work under all contracts made under the Navy Department for public purposes, but not in excess of the value of the work already done; and the contracts made shall provide for a lien in favor of the Government, which lien is made paramount to all other liens, upon the articles or thing contracted for on account of all payments so made: *Provided,* That partial payments shall not be made under such contracts except where stipulated for, and then only in accordance with contract provisions.

3. Section 13, chapter 178, Revised Statutes of Maine, 1954, provides as follows:

> Whoever furnishes labor or materials for building a vessel has a lien on it therefor, which may be enforced by attachment thereof within 4 days after it is launched; but if the labor and materials have been so furnished by virtue of a contract not fully completed at the time of launching of the vessel, the lien may be enforced within 4 days after such contract has been completed. He also has a lien on the materials furnished before they become part of the vessel, which may be enforced by attachment; and the owners of any dry dock or marine railway used for any vessel have a lien on said vessel for the use of said dock or railway, to be enforced by attachment within 4 days after the last day in which the same is used or occupied by said vessel.

STATEMENT

In March 1954, the United States, through the Department of the Navy and pursuant to invitation for bids, entered into a contract with the Rice Shipbuilding Corporation, East Boothbay, Maine, for the construction of eleven personnel boats, which were to be used aboard and in connection with the operation of combat vessels such as aircraft carriers, battleships and cruisers (R. 10). The contract price for these boats was $175,900 (R. 27). The contractor commenced performance and, as the work progressed, the United States made progress payments based upon estimated percentages of the work completed, less

three percent retained percentages (R. 35, 51–57). As to these progress payments, the contract provided that (R. 36):

> (b) Any and all progress payments made hereunder shall be secured, when made, by a lien in favor of the Government upon the vessels, articles, and things contracted for on account of all payments so made and on all material, equipment and other property acquired for or allocated to the performance of this contract, except to the extent that the Government, by virtue of any other provision of this contract, or otherwise, shall have valid title to such articles, things, materials, or other property as against other creditors of the Contractor. If such property is not identified by marking or segregation, the Government shall be deemed to have a lien upon a proportionate part of any mass of property with which such property is commingled. Any lien provided for by virtue of this Section is paramount to all other liens under the provisions of an Act approved August 22, 1911 (Pub. No. 41, 62nd Cong., 37 Stat. 32; 34 U.S.C. sec. 582).

In August 1955, the contractor was notified by the Contracting Officer of the Bureau of Ships that the United States was terminating the contract for default because of a failure to deliver the boats within the specified time and to make satisfactory progress in performance of the contract.[1] The contractor was

[1] At the time of termination, one vessel had been completed and delivered to the Government, and the remaining ten vessels were in various stages of construction (R. 48).

also informed that the United States would exercise its right under the contract to have the undelivered vessels completed by another shipbuilder, the excess costs of completion to be borne by the contractor. Finally, the contractor was directed, pursuant to Clause 11(d) of the contract,[2] to transfer to the Government title to the partially completed vessels and certain manufacturing materials, and to deliver the vessels and materials to the Navy in the manner and at the time specified by it (R. 47–49).

On August 4, 1955, the contractor executed an "Instrument of Transfer of Title" by which the con-

[2] Clause 11(d), part of the standard form default clause prescribed by the General Services Administration (R. 39), provided as follows (R. 42–43):

"If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called 'manufacturing materials') as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. The Government shall pay to the Contractor the contract price for completed supplies delivered to and accepted by the Government, and the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property. Failure to agree shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes.'"

tractor's right, title and interest in the manufacturing materials were transferred as specified by the Government (R. 49–51). The materials were thereafter removed by the Government from the State of Maine to naval shipyards at Norfolk, New York, and Philadelphia, where the materials were used in completing construction of the vessels (R. 10–11).

Prior to termination of the contract, progress payments in the amount of $141,387.20 were made by the United States to the contractor (R. 11, 54–55). After termination, the cost of completing the boats was $166,627.34, exclusive of the materials transferred from the contractor (R. 12). The added cost of completion of the boats resulted in the assessment of "excess costs" against the contractor in the amount of $146,470.28 (R. 12, 59), no part of which has been paid (R. 12). The contractor, now adjudicated a bankrupt, did not contest the termination of the contract or the assessment of excess costs (R. 12, 20).[3]

Petitioners are twenty-seven suppliers[4] who, at the request of the contractor, furnished materials and equipment in connection with the contractor's part performance of the Navy contract (R. 14–15). The total amount due and owing the petitioners from the contractor is $23,732.72, and claims in that amount were filed by the petitioners with the bankrupt estate (R. 16–17).

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[3] The Government's claim for the excess costs incurred was filed in the bankruptcy court (R. 59, Pet. Br. 6).

[4] Seven of the petitioners are located in Maine. Of the remaining twenty, eight are located in Massachusetts, four in Connecticut, four in New York, and one, respectively, in Illinois, Indiana, Maryland, and West Virginia (R. 6).

Petitioners brought this action in the Court of Claims (R. 1–5) seeking "just compensation" for the alleged "destruction," by the United States, of property rights consisting of statutory liens allegedly acquired under Maine law (R. 4–5). Specifically, petitioners alleged that "[u]pon taking title to and possession of the * * * hulls, materials and supplies, the [United States] became obligated under the Fifth Amendment to the Constitution * * * to pay to each of the plaintiffs just compensation for their respective lien and property rights in the * * * hulls, materials and supplies." (R. 4). The petitioners sought compensation in the amount of $23,732.72 (R.5).

On cross-motions for summary judgment, the Government's motion was granted and petitioners' was denied (R. 24). The Court of Claims held that petitioners acquired no compensable rights against the United States where, as here, the contract provided for passage of title to the Government upon the contractor's default and where, pursuant to that contractual provision, title had in fact passed to the Government.

SUMMARY OF ARGUMENT

This is a suit for just compensation. Petitioners, claiming materialmen's liens under Maine law on property supplied for the performance of a Government contract, seek compensation for the "taking" of those liens—a "taking" which allegedly occurred when, upon termination of the contract for default (as authorized in the contract), title to the property was transferred to the Government by the contractor.

In essence, petitioners urge that the United States, under its contract, did not acquire an absolute title to the property transferred to it, but took it subject to petitioners' subsisting liens. It is argued further that, since petitioners could not enforce their liens against property in the possession of the Government, they were entitled to look to the United States to provide a fund for payment of their state-created lien rights. Having failed to provide this fund, the argument concludes, the Government is now required to pay just compensation. Both the premises and the conclusion of this argument are without merit.

I

A. The United States acquired absolute title to the property in question when it invoked the termination clause of the contract. This clause expressly provides that, if the contractor defaults prior to completion and acceptance of the vessels, the Government may require that the property acquired for the performance of the contract be conveyed to the United States. It was pursuant to this provision of the contract that the contractor, without objection, transferred title to the Government.

The provisions of the contract which (1) give the United States a paramount lien on the things contracted for on account of progress payments, and (2) require the contractor to discharge any lien or right *in rem* cannot be regarded as a recognition by the United States that state-created liens may be asserted against property transferred to the Government pursuant to the termination clause. These provisions

serve only to protect the interests of the Government in circumstances where title has not actually passed to it.

B. *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, supports our construction of the contract. There, the Court held that state-created liens could not subsist in relation to property which had passed to the Government pursuant to the provisions of a progress-payments clause. The same result should obtain in circumstances where title has passed to the Government pursuant to a termination clause.

C. Under petitioners' interpretation of the contract, the United States would be required to compensate unpaid materialmen claiming security interests under state law, even if the contractor had completed his work under the contract and the Government had acquired title upon delivery and acceptance of the vessels. This view is untenable. It would require the Government to pay an indefinite amount in excess of its fixed contract price in order to obtain absolute title to the property.

II

In no event was there a compensable "taking" of petitioners' asserted liens, within the meaning of the Fifth Amendment.

A. It is settled that consequential loss or injury resulting from lawful Governmental action does not give rise to a taking in the constitutional sense; it is essential that there be a direct appropriation of property rights. In this case, the Government was dealing solely with the contractor, and it acquired title

and possession of the vessels pursuant to the exercise of its rights under a lawful Government contract. Petitioners' lien rights may thereby have been frustrated, but they were not appropriated.

B. Petitioners recognize that sovereign immunity precludes the assertion of lienholders' rights against property which has been lawfully acquired by the United States. They may not accomplish indirectly, through a just compensation suit in the Court of Claims, what they may not do directly in a suit against the Government in a federal district court.

C. The Government's paramount lien was not lost through merger in the Government's title, and therefore nothing of value was lost by the petitioners. There was no equity in the property transferred to the Government which would have been available for the satisfaction of petitioners' subordinate liens, and, accordingly, there could be no taking.

ARGUMENT

I

THE GOVERNMENT ACQUIRED ABSOLUTE TITLE TO THE PROPERTY TRANSFERRED TO IT PURSUANT TO THE TERMINATION CLAUSE OF THE CONTRACT

The United States entered into a contract for the construction of certain naval vessels. Upon default of the contractor, the United States exercised its contractual right to terminate the contract and require the contractor to transfer title to the uncompleted vessels to the Government. It is undisputed that the contractor has received all the money to which it was entitled for its partial performance of the contract; it is also established that the contractor remains liable for excess costs incurred in completion of the vessels.

Petitioners, who are unpaid materialmen claiming liens created by Maine law,[5] urge that the United States, upon receiving title and delivery of the uncompleted vessels pursuant to its contract, was required to establish a fund for the payment of their materialmen's liens. And, having failed to do so, petitioners contend, the United States is now required to provide just compensation for the "destruction" of their liens.

We do not understand petitioners to argue that the Maine lien statute, in and of itself, created an obligation on the part of the United States to compensate petitioners in the event the United States determined—as it did here—to exercise its termination

[5] We do not brief the question, not reached by the Court of Claims, whether, under the Maine statute as construed by the Maine courts, any or all of the petitioners may claim lienholder rights. It is noteworthy, however, that, although the Maine statute imposes a lien for material furnished to build a ship, it does so only when it appears that the materialmen's contract was made with reference to Maine law. *Mehan* v. *Thompson*, 71 Me. 492. In determining whether any given materialmen's contract is made with reference to Maine law, it is relevant to inquire whether the contract was between Maine citizens, and whether it was actually executed within the state's limits. *Ibid.* In this case, the petitioners' contracts with the Maine contractor are not in the record; twenty of the twenty-seven petitioners, however, are located outside of Maine (see, *supra*, p. 6, fn. 4).

We point out, moreover, that the Court of Claims did not determine whether the petitioners took appropriate steps under Maine law to render enforceable their asserted liens and to give them effect *vis-a-vis* bona fide transferees of the subject property. In this connection, it should be noted that, in order for materialmen's liens to be enforceable under Maine law, it is necessary that a writ of attachment be obtained pursuant to Section 14*ff*., chapter 178 of the Revised Statutes of Maine, 1954. Unless the lien is secured in the precise manner prescribed by Section 14*ff*., the materialmen would stand on the same footing as any other creditor, *Perkins* v. *Pike*, 42 Me. 141, and would clearly enjoy no rights against one who had already purchased the vessel from the builder. *Decring* v. *Lord*, 45 Me. 293.

rights under its contract with the shipbuilder and call for the transfer of title to the uncompleted vessels. State law cannot, of course, impede, diminish, or modify the provisions of a contract entered into by the United States in the performance of one of its constitutional functions. Article 6, Clause 2, of the Constitution; *United States* v. *Allegheny County*, 322 U.S. 174, 183; *United States* v. *Latrobe Construction Co.*, 246 F. 2d 357 (C.A. 8), certiorari denied, 355 U.S. 890; *McKnight* v. *United States*, 259 F. 2d 540 (C.A. 9); cf. *McCulloch* v. *Maryland*, 4 Wheat. 316.

Nor do we understand petitioners to argue that if, under the contract in issue here, the United States acquired an *absolute* title to the transferred materials, the materialmen would be entitled to look to the United States for compensation. *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452; cf. *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 241, 244; *Equitable Surety Co.* v. *McMillan*, 234 U.S. 448, 455; *Hall* v. *American Surety Co. of New York*, 200 U.S. 197, 203.*

Rather, petitioners suggest that particular provisions of the contract manifest a recognition on the part of the United States that state-created liens could subsist on property to which title had passed to the Government pursuant to the termination clause of the contract. In other words, petitioners urge that the

* Petitioners are also precluded from arguing that they had any implied or express contractual right against the United States for the amounts due them from the contractor. See *Dewey Schmoll, Successor, et al.* v. *United States*, 105 C. Cls. 415; *H. Herfurth, Jr., Inc.* v. *United States*, 89 C. Cls. 122.

United States, by virtue of the terms of this contract, did not acquire an absolute title to the property transferred to it upon termination for the contractor's default. And so, the argument continues, petitioners were entitled to look to the United States to provide a fund for payment of their state-created lien rights. In our view, this position finds no support in any of the contractual provisions.

A. THE PERTINENT CONTRACTUAL PROVISIONS

The contract, in Clause 11(a), *supra*, p. 5, fn. 2, makes express provision for the transfer of title to the United States of parts and materials acquired for the performance of the contract upon the happening of stated events prior to completion and acceptance of the vessels. Thus, upon termination and default, the Government may require the contractor "to transfer title and deliver to the Government * * * supplies and materials * * * specifically acquired for the performance" of the contract.

Despite the unambiguous language of this provision, petitioners argue that other provisions of the contract—principally, the "Progress Payments and Lien" clause (*supra*, p. 4) and the "Discharge of Liens" clause (R. 37)[7]—demonstrate a recognition by the United States that state-created liens might subsist.

[7] "DISCHARGE OF LIENS: The Contractor shall immediately discharge or cause to be discharged any lien or right *in rem* of any kind, other than [in] favor of the Government, which at any time exists or arises with respect to the boats, and machinery, fittings, equipment or materials for the boats. If any such lien or right *in rem* is not immediately discharged, the Government may discharge or cause to be discharged said lien or right *in rem* at the expense of the Contractor."

In other words, those provisions, according to petitioners, precluded the transfer of absolute title to the United States. In petitioners' own language (Br. 23), "[i]f it were otherwise, there would be no necessity to provide for the Government to have a *paramount* lien for partial payments and no need to have a contract provision for the discharge of liens against the boats and materials." (Petitioners' emphasis.) But this is not so.

The provision which gives the United States a paramount lien on the things contracted for on account of partial payments is nowise inconsistent with the title-vesting provision of the termination clause of the contract. The lien is prescribed by the Act of August 22, 1914, 37 Stat. 32, 34 U.S.C. (1952 ed.) 582,[8] *supra*, p. 2, and was designed "to give the fullest protection to the government for progress payments made by it." See *Thomson Mach. Works Co. v. Lake Tahoe Marine Sup. Co.*, 135 F. Supp. 913, 916 (N.D. Calif.); see, also, H. Rept. No. 39, 62d Cong., 1st Sess., pp. 2-6.[9] There may be many instances—as petitioners themselves recognize (Br. 22) -where, for practical reasons, the United States, upon default of the contractor, may not choose to exercise its contractual right to obtain title and delivery. Or there may be a refusal on the part of the contractor, arising out of disagreement as to whether default occurred, to abide by the Government's invocation of the termination provision of the contract.

[8] It is now codified in 10 U.S.C. 7521.

[9] For a general discussion of the progress payments clause, see Whelan, *Government Supply Contracts*, 26 Ford. Law Rev. 224 (1957).

In the absence of a contractual provision giving the United States a paramount lien on the materials contracted for, the United States would constantly run the risk of double payment where materialmen and suppliers claimed superior rights, under state law, to the materials in the possession of the contractor. The provision according the Government paramount lien rights in the property is plainly designed, therefore, to protect the interests of the Government in circumstances where title has not actually passed to it. This same purpose is obviously served by the contractual provision requiring the contractor to "immediately discharge or cause to be discharged any lien or right *in rem* of any kind, other than [in] favor of the Government, which at any time exists or arises with respect to the boats, and machinery, fittings, equipment or materials for the boats" (R. 37). These provisions can hardly be construed, we submit, as a recognition, on the part of the Government, that state-created lien rights may subsist on property to which the Government has actually acquired title pursuant to its express contract.

B. *UNITED STATES* v. *ANSONIA BRASS & COPPER CO.*, 218 U.S. 452, SUPPORTS THE GOVERNMENT'S POSITION

The *Ansonia Brass* case, heavily relied on by petitioners, does not detract from this construction of the contract and, indeed, gives support to it. In *Ansonia Brass*, three vessels, the BENYUARD, the MOHAWK, and the GALVESTON, were under construction pursuant to Government contracts. The contractor became insolvent and a receiver, appointed by the state court, took

possession of the contractor's property, including the three uncompleted vessels. Suppliers of the contractor asserted liens against the vessels under the lien law of Virginia. As against these claims, the United States claimed title to the BENYUARD under the particular contract clause providing for passage of title to the United States as progress payments were made. The United States did not, however, claim title to the MOHAWK or GALVESTON, or assert that, by reason of the contract provisions relating to those vessels, state-created liens could not subsist. Rather, the Government argued that contractual liens reserved to the United States for progress payments were superior to the supply liens (*id.* at 453–456).

The suppliers contended that, notwithstanding the BENYUARD contract provisions for the vesting of title in the Government, the state statute operated before the right of the United States accrued; that, therefore, the Government took *cum onere;* and that this was the clear intention of the BENYUARD contract. With respect to the MOHAWK and GALVESTON contracts, the suppliers argued that the contractual liens reserved to the Government were, in the absence of a federal statute establishing the paramouncy of the Government's lien, inferior to state-created supply liens (*id.* at 456–560).

This Court held that the state liens could not subsist with respect to the BENYUARD because, under the construction contract, the contractor's title to parts and materials furnished by suppliers was divested in favor of the Government as progress payments were made in the process of construction, 218

U.S. at 470–471. There is no suggestion in the Court's opinion that the Government had acquired anything less than absolute title to the 70% complete BENYUARD. As to the MOHAWK and GALVESTON, the Court ruled that the Government's claim of a superior lien was unsupported, since it was neither provided for by statute nor by the contracts involved (218 U.S. at 472–473).[10]

We submit that the Court's ruling with respect to the BENYUARD should be dispositive here. If suppliers are precluded from asserting state-created lien rights against property to which title has passed pursuant to a progress-payments clause, we see no reason why petitioners, relying on similar state-created lien rights, are not also precluded from asserting them against property to which title has passed to the Government pursuant to a termination clause. It would be incongruous if the applicability of state lien laws were to depend upon the mechanical question of whether title passed to the Government under one type of contractual provision or the other.[11]

[10] Congressional concern over this aspect of the *Ausonia Brass* decision led to the enactment, one year later, of the paramount lien statute, *supra*, p. 2. See H. Rept. No. 39, 62d Cong., 1st Sess., p. 5.

[11] *Thomson Mach. Works Co.* v. *Lake Tahoe Marine Sup. Co.*, 133 F. Supp. 913 (N.D. Calif.), supports this conclusion. In that case, the court was called upon to decide the conflicting claims of a mechanic and the United States to certain propeller shafts which were supplied to the prime contractor for the construction of utility boats under a Government contract. The contract between the Government and the prime contractor contained, as here, a Progress Payments and Liens Clause which gave the Government a paramount lien, and a Clause 11 providing for transfer of title upon the contractor's default.

C. THE LOGICAL CONSEQUENCES OF PETITIONERS' INTERPRETATION OF THE CONTRACT

If petitioners' interpretation of the contract is correct, *i.e.*, that state-created liens subsisted on property to which title was transferred to the Government pursuant to the termination clause, and the Government was therefore required to provide a fund for payment of those liens, we fail to see why the same result should not logically follow in circumstances where there has been no default under the contract and the Government has taken title to the vessels upon delivery and acceptance. Suppose, in this case, that the contractor had not defaulted, that he had completed construction of the eleven personnel boats, and had been paid the full contract price of $175,900. Under petitioners' argument, the Government could not lawfully accept delivery of those boats without providing additional sums of money for the payment of unsatisfied materialmen's claims against the contractor. The mere statement of this interpretation of the contract

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When default occurred and title was transferred to the United States pursuant to Clause 11, the mechanic claimed a lien under California law on the shafts for work done thereon, and brought an action to quiet title and foreclose the lien which allegedly subsisted. In rejecting this claim, the court said (135 F. Supp. at 915):

"Since a transfer of the property under discussion actually took place, title to the propeller shafts vested in the government according to the provisions of the contract. The government's title to the property must prevail over any lien claim on the part of [the mechanic]."

The presence of the Progress Payments and Liens Clause in the contract—which "was to give the fullest protection to the government for progress payments made by it" (135 F. Supp. at 916)—in no way detracted from the absolute title conferred upon the Government pursuant to Clause 11.

demonstrates its weakness; it presumes a deliberate intention on the part of the Government to pay an indefinite sum in excess of its fixed contract price in order to obtain absolute title to the materials contracted for.[12]

We emphasize that there is no dispute in this case that the contractor has received all the money to which it was entitled for partial performance of the contract. Nevertheless, petitioners urge that the contract must be construed as creating an obligation on the part of the Government to pay additional monies to unpaid materialmen claiming rights under state law. There is nothing in the contract to warrant a holding that there was an intention to assume such an untsual risk.

II

EVEN IF PETITIONERS' LIENS SUBSISTED WHEN TITLE AND POSSESSION OF THE VESSELS WERE TRANSFERRED TO THE GOVERNMENT, THERE WAS NO TAKING OF THOSE LIENS IN THE CONSTITUTIONAL SENSE

In Point I, we have urged that the Government acquired absolute title when it exercised its rights under the termination clause of the contract.[13] Here,

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[12] This flies squarely in the face of the Court's ruling in *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 244, that "When laborers and materialmen, however, are unpaid and the work is complete, the government suffers no damage. The work has been done at the contract price. The government cannot suffer damage because it is under no legal obligation to pay the laborers and materialmen."

[13] The Court of Claims interpreted the provisions of the contract as according the United States "inchoate title" to the materials provided thereunder. We suggest that this characterization of the Government's interest in the property means

we argue that in all events there was no compensable taking within the Fifth Amendment.

Petitioners' constitutional argument, reduced to its essentials, is this: Prior to the Government's exercising its contractual right to terminate and call for transfer of title, petitioners had two strings to their bow—(1) they could proceed against the contractor to recover the monies due them, or (2) they could proceed, by way of foreclosure, against the vessels in the possession of the contractor. And, the argument continues, since the Government's immunity from suit extends to its property as well, the transfer of title to the United States deprived petitioners of one of their strings, *i.e.*, the right to foreclose on the property, and for this the Government is required to pay "just compensation". There are several reasons why this argument must fail.

A. THERE WAS NO DIRECT APPROPRIATION OF PETITIONERS' PROPERTY RIGHTS

When reference is made to that part of the Fifth Amendment which forbids the taking of private property for public use without just compensation, it must be remembered that "we are dealing with a constitutional limitation, and there is no surer way to misapprehend its scope than to ignore its history, and treat it as inspired text." (Learned Hand, J., con-

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nothing more than that the petitioners' interest in the materials was always subject to the right of the United States to exercise its contractual right to call for the transfer of title upon termination for default.

curring in *Addison* v. *Huron Stevedoring Corp.*, 204 F. 2d 88, 97 (C.A. 2), certiorari denied, 346 U.S. 877.)

As the long history of that provision demonstrates, there are two general classes of constitutional takings.

The *first* embraces traditional exercises of the eminent domain power—cases in which Government officials (a) intend to take private property for public purposes pursuant to specific statutory authority, and (b) carry out the formal steps which are part of the condemnation process. In this class of cases, it is the admitted purpose of the Government officials to divest the owner of some legally recognized property interest and to transfer that interest to the United States. This exercise of the eminent domain power is clearly not involved in the present case.

The *second* class, on the other hand, does not depend upon the intention of the Government officials. Whatever the official intention may be, certain governmental actions may entail such an actual invasion of property rights that a constitutional taking may be implied, if the actions are not to be held invalid. See *Penna. Coal Co.* v. *Mahon*, 260 U.S. 393, 413; *Block* v. *Hirsh*, 256 U.S. 135, 155–56; *United States* v. *General Motors Corp.*, 323 U.S. 373, 378; *United States* v. *Dickinson*, 331 U.S. 745, 748; *United States* v. *Pewee Coal Co.*, 341 U.S. 114.[11] Presumably, this is the class

[11] The prime instance, in federal eminent domain, is the destruction of privately owned land by flooding. *United States* v. *Kansas City Ins. Co.*, 339 U.S. 799, 809–810. See, also, *United States* v. *Causby*, 328 U.S. 256 (taking by flights of governmental aircraft); and *Portsmouth Co.* v. *United States*, 260 U.S. 327 (repeated firings of projectiles over owner's land).

of constitutional taking into which petitioners would fit this case.

This Court has long recognized, however, that a prerequisite to such a claim is that it be attributable to a direct appropriation of property rights and not to consequential injuries resulting from the exercise of lawful power. *Legal Tender Cases*, 12 Wall. 457, 551; *Louisville & Nashville R.R. Co.* v. *Mottley*, 219 U.S. 467, 484; *Omnia Co.* v. *United States*, 261 U.S. 502, 510; see, also, *Mitchell* v. *United States*, 267 U.S. 341; *United States* v. *Carver*, 278 U.S. 294, 300; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 281–283; *United States* v. *Causby*, 328 U.S. 256, 262.

Thus, in *Omnia Co.* v. *United States*, 261 U.S. 502, the Court held that a frustration of a contractual right to purchase steel because of Government requisition of the steel company's product was not a taking compensable under the Fifth Amendment. "[F]or consequential loss or injury resulting from lawful governmental action," the Court said, "the law affords no remedy." *Id.* at 510. In language pertinent here, the Court went on to explain (*id.* at 511):

> In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended.

And in *Mitchell* v. *United States*, 267 U.S. 341, the owner was denied compensation for the destruction of his business, which resulted from the taking of his land for a public project, even though the business could not be reestablished elsewhere. This Court, after noting that "settled rules of law" precluded a consideration of "consequential damages" for losses of a business or its destruction, stated (267 U.S. at 345):

> No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land * * *.[15]

So, too, in *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282, this Court, quoting *Omnia Co.* v. *United States*, *supra*, p. 513, reemphasized that "it is well settled * * * that, 'Frustration and appropriation are essentially different things' ", and that, for the former, the United States is not required to make compensation. See, also, *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155.

This case falls squarely within those settled principles. The United States did not appropriate, either intentionally or unintentionally,[15a] petitioners' lien rights. The Government was dealing solely with the

[15] The owner had been compensated for the taking of his land.

[15a] Indeed, it is not alleged that the Government had any notice of the liens. And see note 5, p. 11, *supra*.

contractor pursuant to a lawful contract entered into under the provisions of the Defense Production Act (R. 27). And it was pursuant to the exercise of that lawful governmental action that the United States acquired title and possession of the vessels. In no constitutional sense, we submit, was there any appropriation of petitioners' property rights.

B. PETITIONERS' INABILITY TO ENFORCE THEIR LIEN RIGHTS AGAINST THE GOVERNMENT DOES NOT GIVE RISE TO A COMPENSABLE TAKING

From at least the time of *The Siren*, 7 Wall. 152, it has been settled that the transfer to the Government of property upon which liens exist does not, *ipso facto*, extinguish the lien claims, but merely renders them unenforceable by reason of sovereign immunity. See, also, *United States* v. *Alabama*, 313 U.S. 274, 280–281; *United States* v. *City of Buffalo*, 54 F. 2d 471 (C.A. 2), certiorari denied, 285 U.S. 550; *United States* v. *John K. & Catherine S. Mullen Benevolent Corp.*, 63 F. 2d 48 (C.A. 9), affirmed *sub nom. Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89; *United States* v. *Anderson Cottonwood Irr. Dist.*, 19 F. Supp. 740 (N.D. Cal.). It has never been held, so far as we have been able to ascertain, that the inability to enforce a property right against the Government without its consent may serve as the basis of a just compensation suit for the value of that property right. On analysis, this is precisely what petitioners seek to accomplish.

In Paragraph 8 of petitioners' complaint, it is alleged that (R. 4):

> Upon taking title to and possession of the said hulls, materials and supplies, the defendant

became obligated under the Fifth Amendment to the Constitution of the United States to pay to each of the plaintiffs just compensation for their respective lien and property rights in the said hulls, materials and supplies.

The unmistakable import of this allegation—which is the heart of petitioners' suit—is that, by virtue of the petitioners' inability to enforce its lien rights against the United States, the United States became obligated to make compensation for the value of those rights.[16] But, as this Court recognized in *Lynch* v. *United States*, 292 U.S. 571, 582, "[t]he sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced." The Government's immunity would be meaningless if a party were to be able to accomplish indirectly—in a suit for just compensation—what he is unable to accomplish directly in a suit against the sovereign.[17]

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[16] Petitioners' allegation in the preceding paragraph of their complaint (Paragraph 7, R. 4), *i.e.*, that the Government removed the property "from the State of Maine, thereby depriving the plaintiffs of their right to exercise their liens", plainly does not add anything to petitioners' claim. Once the United States acquired title to the property, the petitioners would be precluded from proceeding against the property whether it were located in Maine or elsewhere.

[17] Cf. *Lynch* v. *United States*, *supra*, at 582:

"The character of the cause of action—the fact that it is in contract as distinguished from tort—may be important in determining (as under the Tucker Act) whether consent to sue was given. Otherwise, it is of no significance. For immunity from suit is an attribute of sovereignty which may not be bartered away."

United States v. *John K. & Catherine S. Mullen Benevolent Corp.*, 63 F. 2d 48 (C.A. 9), affirmed *sub nom. Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, is precisely in point. There, the plaintiff brought an action under the Tucker Act for the taking of a lien allegedly held on property which was acquired by the Government. The court held (1) that the plaintiff did not have a lien on the property at the time of its transfer to the Government, and (2) that, even if the plaintiff had a valid lien on the property, there would still not be a taking of plaintiff's property. The only loss that plaintiff sustained was the disability to enforce his lien against the Government. In holding that this did not constitute a taking of property by the Government which would give rise to a cause of action, the court said (63 F. 2d at 56):

> It is therefore argued in effect that inasmuch as the government has not consented to the foreclosure of lien upon its land it must be deemed to have agreed to pay the amount which would be realized from such a foreclosure. In short, it is contended that the refusal of the sovereign to permit a foreclosure suit to enforce a lien against property acquired by it for public purposes amounts to a taking of the lien from which taking an implied contract to pay therefor arises from which a consent to sue the United States is derived. Thus, from a refusal (or failure) to permit a suit to be brought against the United States a consent thereto is to be implied. This does not seem to be a tenable position.

Petitioners reliance on *Thibodo* v. *United States*, 187 F. 2d 249 (C.A. 9), is mistaken. That case arose

out of a statutory condemnation proceeding involving land in California to which, pursuant to the filing of a Declaration of Taking, the United States had acquired title in fee simple absolute.[18] Thibodo was the owner of certain municipal street improvement bonds which, under California law, constituted a lien on the lands involved. The municipality, under the local law, was not liable on the bonds. California law afforded no remedies to the bondholders except an action to foreclose on the land by the municipality or the bondholder. Cal. Streets and Highways Code, §§ 6500, 6610; see *Thibodo* v. *United States*, 134 F. Supp. 88, 94 (S.D. Cal.).

Thibodo had not been made a party to the condemnation proceeding. Claiming that the United States took his interest in the property without paying just compensation, he instituted suit under the Tucker Act for the value of his bonds. The Government defended on the grounds that (1) the plaintiff was not a necessary party to the condemnation proceeding and (2) the Government had no notice of the plaintiff's lien. The court of appeals held, *first*, that, under California law, "a lienholder has a present proprietary interest

[18] The Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258(a), provides in pertinent part that "Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto * * *."

in the subject matter of land sought to be taken by eminent domain proceedings which confers a right to have such interest considered and determined in said action." 187 F. 2d at 256. *Second,* the court held that "the lien here involved is a subject of public record, charging a subsequent condemnor with constructive notice thereof. Armed with this knowledge, the amount of the lien could have been withheld for its rightful claimant" (*id.* at 255).

An entirely different situation is, of course, presented in this case. In the first place, assuming that petitioners' liens subsisted, they were not terminated upon transfer to the Government but merely rendered unenforceable by reason of the Government's immunity from suit. See *supra,* pp. 24–26. Secondly, petitioners were not left without remedy when the vessels were transferred to the United States. Unlike Thibodo, they could still sue on the debt owing to them and they have, in fact, filed claims in the bankruptcy proceeding. And, finally, it has never been alleged that the United States had either actual or constructive notice of petitioners' liens. Indeed, the Maine statute does not provide for the recording of such liens.[19]

[19] Cf. *Thibodo* v. *United States,* 187 F. 2d 249, 256 (C.A. 9): "Since many western states, with their scores of municipalities, make use of similar plans in providing for a means of payment for improvements, it is not an unreasonable burden to require the condemnor with knowledge of a lien to make inquiry into the records of such matters, where it is clear that such a public record is required to be maintained. This is a normal part of the process of determining the proper parties to whom the award is to be made."

C. PETITIONERS' LIENS WERE SUBORDINATE TO THE GOVERNMENT'S LIEN

There is still another ground upon which the decision below may be sustained. Under the Progress Payments and Liens Clause of the contract (R. 35) and 34 U.S.C. (1952 ed.) 582, *supra*, p. 4, the progress payments in the amount of $141,387.20 made to the contractor gave rise to a lien in favor of the Government that is paramount to "all other liens." Thus, even if petitioners had liens on the material and vessels, they were subordinate to the Government's lien.

Attempting to meet this argument, petitioners contend (Br. 30) that the "paramount lien" given to the Government by statute and contract was lost through merger in the Government's title. We dispute this. It is generally true, under the equitable doctrine of merger, that where the owner of a lien upon an estate acquires the fee, a merger results. But it has been repeatedly held that where "there is any reason for keeping [the lesser estate] alive, such as the existence of another encumbrance, equity will not destroy it" but will preserve the separate existence of the two estates. 1 Pomeroy, *Equity Jurisprudence* (5th ed.), § 791. And "[e]quity will not use merger if serious injustice would arise or intent be obviously frustrated." 1 Bogert, *Trusts and Trustees*, § 129; see, also, *In re Phipps' Will*, 157 N.Y.S. 2d 14, 138 N.E. 2d 341; *Morgan* v. *Murton*, 131 N.J. Eq. 481, 26 A. 2d 45; 1 Tiffany, *Real Property* (3d ed.), § 286.

The presumption of an intent to preserve the encumbrance alive may be inferred "from the circum-

stances of the case, from the position of the owner's property, *and especially from the fact that a merger would let in other charges or encumbrances.*" 3 Pomeroy, *Equity Jurisprudence* (5th ed.) § 791, and cases there cited (emphasis added).

We need hardly labor the point that it was obviously not the intention of the Government contracting officers that the United States, upon termination of the contract for default, should enjoy less rights than it had prior to termination. In the circumstances of this case, there is a clear reason for keeping the lesser estate alive and, therefore, there can be no merger so as to extinguish the Government's paramount lien.

In view of the paramountcy of the Government's lien on the contractor's property, the petitioners cannot seriously complain that anything of value was taken from them. In this connection, the petitioners recite that (Br. 34):

> As a practical matter, the Government was unjustly enriched at the expense of the petitioners, for the contractor's equity of $57,158.03 in the property * * * was more than sufficient to pay the $23,732.72 claimed by petitioners.

But the contractor had no "equity" in the property whatsoever. It is undisputed that the contractor received all the money to which it was entitled and, indeed, remains indebted to the United States in the amount of $146,470.28 (R. 11).

Moreover, petitioners base their computation of this "equity", not on the contract price and the percentage of completion of the contract, but, rather, upon the

amount which the contractor allegedly paid for the labor and materials which went into the work. This, however, ignores the Government's agreement with the contractor; it converts a fixed-price contract into a cost contract, which is certainly not what the Government bargained for. Since there was no "equity" in the property transferred to the Government which would have been available for the satisfaction of petitioners' liens, there could be no taking.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Claims should be affirmed.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 270

CECIL W. ARMSTRONG, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Claims

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. Regardless of the Type of Title the Government Received, It Was Subject to the Liens of the Petitioners

The decision below was bottomed on the erroneous premise that the clause of the Rice contract giving the Government the option, in the event of a termination for default, to acquire title to manufacturing materials (Clause 11(d), R. 42), gave the Government "inchoate title" to these materials; further, this "inchoate title" prevented the petitioners from acquiring statutory

liens on the uncompleted vessels and materials (R. 24). The Government has diluted the reference of the court below to "inchoate title" by suggesting that "this characterization of the Government's interest in the property means nothing more than that the petitioners' interest in the materials was always subject to the right of the United States to exercise its contractual right to call for the transfer of title upon termination for default." (Br. for U.S., p. 19, fn. 13). Thus the Government concedes, in effect, that it did not have title but merely an option to acquire title. The Government glosses over the fact that the petitioners could and did acquire liens during the period of time that the title to the uncompleted boats and materials was in Rice, by asserting that, in effect, any lien rights acquired by the petitioners were of no consequence since the Government later acquired "absolute" title from Rice.[1]

[1] In a marginal note, the Government's brief (fn. 5, p. 11) raises for the first time questions of whether, under Maine law, the petitioners had valid liens. The decision below was rendered on cross-motions for summary judgment and the court below remarked that the parties were in "substantial agreement . . . as to the circumstances giving rise to plaintiff's claim" (R. 18). The contracts between petitioners and Rice were "sales whereby Rice, located in Maine, ordered materials shipped to its plant in Maine for use on the contract to supply boats to the Government."

It is to be noted that under the Maine statute, the petitioners had four days after launching of the boats, or four days after the contract was completed, to enforce their attachment. See Ch. 2, Chap. 178, Rev. Stat. of Maine, 1954 (Br. for Pet., p. 2). Termination of the Rice contract was on August 2, 1955 and the Instrument of Transfer of Title was executed on August 4, 1955 (R. 17, 51). The petitioners' position is similar to that of the lien claimants under the similar New Hampshire statute in *In re Mt. Washington S. S. Co.*, 43 F. Supp. 176, 179 (D.N.H.), who were unable to perfect their liens because bankruptcy intervened before the time for filing an attachment had expired. In that case the lien claimants were given the right to prove their claims and liens in the bankruptcy proceedings.

The Government contends that there should be no distinction drawn as to applicability of liens created by state laws whether the Government acquires title under a title-vesting type of progress payment clause or under the Default clause. The title-vesting type of progress payment clause operates immediately whereas the Default clause could be utilized only on the condition that the contractor was in default and further required the exercise of two options by the Government: first to terminate for default, and second to "require" the contractor to transfer title to the Government (Cl. 11(d), R. 42). The availability to the Government of these two options, provided the contractor was in default, could hardly cut off the rights of lien creditors which arose prior to the exercise by the Government of its options. The impracticability and the repercussions of this position have been discussed in petitioners' main brief (pp. 22-25) in connection with the subject of "inchoate title". The Government's argument is purely academic for it ignores the fact that in the instant case the Government restricted its security for the progress payments it made to a lien in its favor (R. 36) and that it recognized that other liens might be acquired against the property by inserting a Discharge of Liens clause (R. 37).

Our position as to title being in the contractor at all times prior to the execution of the "Instrument of Transfer of Title" is supported by the case of *Thomson Machine Works Co. v. Lake Tahoe Marine Supply Co.*, 135 F. Supp. 913, 915 (N.D. Calif.), cited by the Government. That case involved a contract similar to the Rice contract, and like Rice, Tahoe executed a transfer of title to the Government after termination for default. The Court said:

> There is no question but that title to the propeller shafts was always in Tahoe. When Tahoe transferred title to the government, title as to the vessel and to materials vested in the government.

The argument that the Government, under petitioners' theory, had an open-end liability for "unsatisfied materialmen's claims" (Br. for U.S., p. 18) is without merit. The Government had the right under the Discharge of Liens clause (R. 37) to discharge liens at the expense of the contractor, if the contractor had failed to do so. The Government retained a percentage of the contract price until final acceptance of all work (Progress Payments and Liens clause, (a), R. 35), so that it had some contract funds with which to pay liens. Further, since final acceptance of the work could not take place until six months after delivery of the boats to the Government (R. 32, 36), the holders of any liens would have to assert their claims long prior to the disbursement to the contractor of the retained funds. Finally, the Government could, if it wished, resort to foreclosure proceedings and rely on its paramount lien to protect its position.[3]

The Government's argument fails to come to grips with the basic issue raised in the first point of petitioner's brief (p. 10, *et seq.*). The title to the uncompleted boats and materials was in Rice at all times prior to the execution of the "Instrument of Transfer of Title"

[3] Thompson had sought to enforce his lien on the materials and title vested in the Government, he did not seek just compensation.

[4] H. Rep. No. 39, 62nd Cong., 1st Sess., p. 3, cited by the Government, which recommended adoption of the paramount lien statute (Act of August 22, 1911, 37 Stat. 32, 34 U.S.C. 582), based upon an opinion of the Attorney General expressly recognizing that liens might be acquired by materialmen and suppliers on boats being constructed for the Navy.

and the Government in its reply brief herein, has not taken a contrary position. During the period title was in Rice the petitioners acquired valid liens upon the materials and boats and these liens were an encumbrance upon the uncompleted boats and materials when the Government acquired title thereto.

II. The Government's Lien Was Merged in Its Title When It Acquired Title

The Government argues that its paramount lien should not be considered merged in its title for equitable reasons (Br. for U.S., pp. 29-31). The doctrine of merger was discussed in petitioners' brief (p. 30). While there may be instances when equity will decree that the acquisition by a lien holder of the title will not result in the merger of the inferior interest in the superior interest, the Government has failed to show any equitable considerations which should give rise to this "excepted" doctrine.[1] If the property were still subject to a foreclosure sale, there might be some basis for contending that the Government's lien was not merged. But where the Government has "cloaked" the property with its sovereign mantle, its contention that its lien was not merged in what it terms "absolute" title is without merit.

With regard to the equities which the Government claims in the property it acquired from Rice, the debt which Rice is alleged to owe to the Government resulted from work performed by the Government after

[1] An examination of the "supporting" authorities cited by the Government (Br. for U.S., p. 29) shows that two of the three texts [illegible] and both of the cases were concerned with the mergers of [illegible] not with liens. The third text, Pomeroy's Equity Jurisprudence (5th ed., Sec. 791), is concerned only with general equitable principles.

it acquired title to and possession of the property.[1] In no way is the alleged indebtedness pertinent to the issues herein. The obligation of the Government to the petitioners accrued when the Government acquired title.

III. The Destruction of the Petitioners' Liens by the Government Constituted a Taking in the Constitutional Sense

It has long been recognized that the lien of a supplier, laborer or a mechanic upon a building or a vessel is predicated upon the sound ground that having enhanced the value of the structure or the vessel, the laborer, supplier or materialman is entitled to priority of payment for the value of the work performed or the material suplied. See *Van Stone v. Stillwell & Bierce Mfg. Co.*, 142 U.S. 128, 136.

As made clear by the Court's decision in *United States v. Munsey Trust Co.*, 332 U.S. 234, 244 (cited by the Government), the statutory provisions which require a contractor to furnish a payment bond, were designed to protect laborers and materialmen in order to place the risk of their payment upon a surety rather than the Government. But in the instant case, the Government made no provisions for bonds to secure the payment of the petitioners.

---

[1] The Government claims Rice owes it $146,479.28 for excess costs. This sum allegedly results principally from completion costs, solely for construction, of $166,627.34 (R. 11-12). Rice had a contract price of $175,900 and, based upon partial payments received, the contract was 82% complete (R. 53). The completion costs ranged from 71.16% to 100% of completion (R. 57). Four months prior to termination Rice had spent $108,335.23 (R. 58). Thus it would appear that to complete the remaining 18% of the work the Government spent about 85% as much as Rice had spent to perform 82% of the work.

Rice is a bankrupt and there are no assets in the estate, nor will any become available to pay the petitioners for the materials and supplies they furnished to Rice for use on the subject boats (R. 17). The liens which were acquired by the petitioners under the Maine statute for the value of the materials and supplies they furnished for the the subject boats was the only means they had to obtain payment.

While the Government apparently contends it had no notice of the liens of the petitioners (Br. for U.S., p. 28), in his letter of August 2, 1955 terminating the contract, the Contracting Officer took the position that Rice had stopped work on March 25, 1955 and had not thereafter resumed (R. 48). At the time the Government was considering whether it would require Rice to transfer title, it could have made inquiry as to nature and extent of the encumbrances upon Rice's title. At that point, the Government had its option to decide whether it should foreclose its paramount lien or whether it should acquire Rice's title with its encumbrances. The Government having elected to acquire Rice's title with its encumbrances, it should not now complain that it is being asked to pay the encumbrances which it has assumed as an incident to its acquisition of Rice's title.

It has been said that it is not necessary to establish the awareness of the Government that its acts might result in a taking in order for the courts to have jurisdiction in a suit for just compensation. *Cotton Land Co.* v. *United States*, 109 C. Cls. 816, 831-2. See also *International Paper Co.* v. *United States*, 282 U.S. 399, 407. The issue of lack of notice of liens has not been previously raised in these proceedings. However, since the Government claims this feature distinguishes the case of *Thibodo* v. *United States*, 187 F. 2d 249, 256

(C.A. 9), we must observe that the quotation from that case in footnote 19 (Br. for U.S., p. 28) is followed by the following language of the court:

> The holding of the trial court to the effect that *the record* did not impart actual or constructive notice to the condemnor leaves unanswered the question of whether the condemnor had actual notice of the appellant's interests. The trial on the merits may reveal this important circumstance.

Actually the Government knew Rice was defaulting because it had exhausted its funds and was not able to pay its creditors (R. 48).

The Government's reliance upon *United States* v. *John K. & Catherine S. Mullen Benev. Corp.*, 63 F. 2d 48 (C.A. 9) affirmed sub. nom. *Mullen Benev. Corp.* v. *United States*, 290 U.S. 89, is misplaced. In the Circuit Court, the decision had turned on the point that the plaintiff did not have a lien on the property at the time the Government acquired title to the property and this Court affirmed that decision solely on that ground. The Circuit Court had also stated that the disability of the plaintiff to enforce its lien did not constitute a taking under the Fifth Amendment. This statement, however, particularly in view of this Court's decision affirming, was unnecessary to the result reached. The same Circuit Court in the later case of *Thibodo* v. *United States*, 187 F. 2d 249 (C.A. 9), reached a contrary result to its dictum in the *Mullen* case by holding that where no provision was made for payment of the lien on property taken by the Government, the lien holder was entitled to sue for just compensation. While the Government attempts to distinguish the *Thibodo* case, the principle that the lien was rendered unenforceable by the Government's taking of the fee

and that this gave rise to just compensation is the crux of the decision.

The argument that the subject taking was consequential or incidental is not sustained by the facts herein. The Government, quoting this Court, has pointed out that frustration and appropriation are essentially different things (Br. for U.S. p. 23), and with this concept we have no dispute. However, it is not correct to say that any taking of a property right which may be the unintentional result of lawful governmental action, is consequential and therefore, not compensable. For example, in *United States* v. *Causby*, 328 U.S. 256, 262, the fact that aircraft approaching an airfield flew low over the Causby property was held to be a "taking", even though the Government contended "there was merely incidental damage occurring as a consequence of authorized air navigation." (p. 260). In *International Paper Co.* v. *United States*, *supra*, there was also held to be a taking, despite the fact that the loss of use by the Paper Company of the waters of the Niagara River was incidental to the Government's lawful requisition from a power company of all water power from the river.

In the instant case, there was specific property taken, that is the petitioners' liens. The taking was more than a mere deprivation of a hope or expectation of business advantage or opportunity as in *Mitchell* v. *United States*, 267 U.S. 341; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266; or *Omnia Co.* v. *United States*, 261 U.S. 502, all cited by the Government. The liens were the sole means by which the petitioners could be assured of the payment of the money due to them. The taking by the Government was a direct appropriation of this security, for which the

petitioners are entitled to just compensation. As this Court remarked in *United States* v. *Dickinson*, 331 U.S. 745, 748:

> The Constitution is "intended to preserve practical and substantial rights, not to maintain theories". * * *
>
> * * * The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure . . . .

The petitioners herein have been deprived by the sovereign of the right to enforce their liens and in this sense the liens were taken from them. Their sole remedy is their right to just compensation.

Respectfully submitted,

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Dated, March 3, 1960

SUPREME COURT OF THE UNITED STATES

No. 270. October Term, 1959.

Cecil W. Armstrong, et al., Petitioners, v. United States of America.	On Writ of Certiorari to the United States Court of Claims.

[June 27, 1960.]

Mr. Justice Black delivered the opinion of the Court.

In this action petitioners assert materialmen's liens under state law for materials furnished to a prime contractor building boats for the United States, and seek just compensation under the Fifth Amendment for the value of their liens on accumulated materials and uncompleted work which have been conveyed to the United States.

The United States entered into a contract with the Rice Shipbuilding Corporation for the construction of 11 navy personnel boats. The contract provided that in the event of default by Rice, the Government could terminate the contract and require Rice to transfer title and deliver to the Government all completed and uncompleted work together with all manufacturing materials acquired by Rice for building the boats. Petitioners furnished various materials to Rice for use in construction of the boats. Upon Rice's default, the Government exercised its option as to 10 of the boat hulls still under construction; Rice executed an itemized "Instrument of Transfer of Title" conveying to the United States the hulls and all manufacturing materials then on hand; and the Government removed all of these properties to out-of-state naval shipyards for use in the completion of the boats. When the transfer occurred, petitioners had not been paid for their materials and they have not been paid since. Petitioners therefore contended that they had liens under Maine law

which provides that "[w]hoever furnishes labor or materials for building a vessel has a lien on it therefor, which may be enforced by attachment thereof within 4 days after it is launched . . . . He also has a lien on the materials furnished before they become part of the vessel which may be enforced by attachment . . . ." Maine Rev. Stat., 1954, c. 178, § 13.

Claiming valid liens on the hulls and manufacturing materials at the time they were transferred by Rice to the United States, petitioners asserted that the Government's action destroyed their liens by making them unenforceable and that this constituted a taking of their property without just compensation in violation of the Fifth Amendment.[1] The Court of Claims, relying on *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452, held that petitioners never acquired valid liens on the hulls or the materials transferred to the Government and that therefore there had been no taking of any property owned by them. 169 F. Supp. 259. We granted certiorari. 361 U. S. 812.

I.

The Court of Claims reached its conclusion from the correct premise that laborers and materialmen can acquire no liens on a "public work." *Hill* v. *American Surety Co.*, 200 U. S. 197, 203; *Equitable Surety Co.* v. *McMillan*, 234 U. S. 448, 455; *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 241. It reasoned that because the contract between Rice and the United States contemplated that title to the vessels would eventually vest in the Government, the Government had "inchoate title" to the materials supplied by petitioners, rendering such materials "public works" immune from the outset to petitioners'

[1] The relevant portion of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."

liens. We cannot agree that a mere prospect that property will later be owned by the United States renders that property immune from otherwise valid liens.

The sovereign's immunity against materialmen's liens has never been extended beyond property actually owned by it. The *Ansonia* case itself, upon which the Court of Claims relied, makes this clear, where in dealing with one aspect of the issues there involved, the Court said:

> "We are not now dealing with the right of a State to provide for such liens while property to the chattel in process of construction remains in the builder, who may be constructing the same with a view to transferring title therein to the United States upon its acceptance under a contract with the Government. We are now treating of property which the United States owns. Such property, for the most obvious reasons of public policy, cannot be seized by authority of another sovereignty, against the consent of the Government." 218 U. S., at 471.

The terms of the contract between Rice and the United States show conclusively that Rice, not the United States, had title to the property when petitioners furnished their materials. The agreement provided for delivery, preliminary acceptance, and final acceptance of the boats, the contractor to remain responsible for all supplies until delivery. The contractor was required to insure the property for the Government's benefit only to the extent of progress payments made and materials furnished by the Government. The very clause here invoked by the Government provided that upon default and termination of the contract the Government might "require the Contractor to *transfer* title and *deliver*" the work, supplies and materials on hand. (Emphasis added.) While the Government was obliged to make progress payments based on the percentage of the work completed, nothing

in the contract provided that ownership of the portions of the work paid for should vest in the United States. On the contrary, it was stipulated that all progress payments should be secured by a paramount government lien on the property. And finally, the contractor was required to discharge immediately any lien or right *in rem* asserted against the property. In their totality, these provisions clearly recognize that title was to remain in Rice during performance of the work, and show that private liens could attach to the property while Rice owned it.

We think, therefore, that the Court of Claims was in error in holding as it did. This, however, does not end the case in petitioners' favor since the United States urges other grounds to support its judgment.

II.

It is contended that petitioners' asserted liens gave them no compensable property interests within the meaning of the Fifth Amendment. Under Maine law, materialmen become entitled to a lien when they furnish supplies; however, the lien must subsequently be enforced by attachment of the vessel or supplies. There is no allegation that any of the petitioners had taken steps to attach the uncompleted work. Nevertheless, they were entitled to resort to the specific property for the satisfaction of their claims. That such a right is compensable by virtue of the Fifth Amendment was decided in *Louisville Bank* v. *Radford*, 295 U. S. 555. In that case, a bank acquired a mortgage which under state law constituted a lien enforceable only by suit to foreclose. Subsequently, Congress amended the Bankruptcy Act so as to deprive mortgagees of substantial incidents of their rights to resort to mortgaged property. This Court held that the bank's property had been taken without just compensation in violation of the Fifth Amendment. No reason has been

suggested why the nature of the liens held by petitioners should be regarded as any different, for this purpose, from the interest of the bank held compensable in the *Radford* case.

The Government, however, suggests that because it held a paramount lien on the property to secure its progress payments, petitioners' claimed liens were in fact worthless. Petitioners, on the other hand, argue that when the Government chose to acquire title to the property rather than to enforce its lien, the lien merged with the title, thus making petitioners' liens paramount, and that even if it did not, and their liens remained subordinate to that of the Government, the value of the hulls and materials would have been sufficient to satisfy the Government's claims and some or all of petitioners' claims as well.

We need not decide whether, as a matter of law, the Government's lien "merged" in its title. At the very least, petitioners, prior to the transfer of title, had the right to whatever proceeds the property might bring over and above the Government's claim to the amount of its progress payments.[4] By the date of default, Rice had expended some $198,000, while the Government had advanced only about $141,000 in progress payments. We have no way of knowing what the property would have brought had it been sold, but it cannot be said with certainty that it would have brought no more than the amount of the Government's claim. Moreover, petitioners themselves might have been able to purchase the property and realize some amount on their claims after the Government's claims had been satisfied. While these

[4] While Rice was also liable to the Government for an additional amount approximating $140,000 representing the excess cost to the Government of having the boats completed, the contract does not provide, and there is no allegation, that this amount was secured by a lien on the property.

factors may present a difficult problem of valuation, we cannot say on this record that petitioners' interests were valueless.

The Government also seems to suggest that because the contract between Rice and the United States expressly gave the Government the option of requiring a conveyance of title upon default, petitioners' liens attached subject to that limitation. Petitioners, however, were not parties to the contract. Furthermore, their liens attached by operation of law and nothing in the record indicates that the scope of such liens is affected by contractual arrangements into which the owner of the property may have entered.

We conclude, therefore, that on this record petitioners must be considered to have had compensable property interests within the meaning of the Fifth Amendment prior to transfer of title to the Government.

III

The final question is whether the Government's action constituted a "taking" of petitioners' property interests within the meaning of the Fifth Amendment. Before the United States compelled Rice to transfer the hulls and all materials held for future use in building the boats, petitioners had valid liens under Maine law against both the hulls and whatever unused materials which petitioners had furnished. Before transfer these liens were enforceable by attachment against both the hulls and all materials. After transfer to the United States the liens were still valid. *United States v. Alabama*, 313 U. S. 274, 281–282, but they could not be enforced because of the sov-

Questions of value of the liens were not determined by the Court of Claims since it entered a summary judgment for the United States for reasons stated on p. — *supra*.

cient immunity of the Government and its property from suit.[1] The result of this was a destruction of all petitioners' property rights under their liens, although as we have pointed out, the liens were valid and had compensable value. Petitioners contend that destruction of their liens under the circumstances here is a "taking." The United States denies this, largely on the premise that inability of petitioners to enforce their liens because of immunity of the Government and its property from suit cannot amount to a "taking."

The Government argues that the *Aerovox* case is dispositive of this Fifth Amendment issue. In that case the contract between the shipbuilder and the United States provided, as to one of the ships contracted for, the dredge *Bonnard*, that as progress payments were made the portion of the work paid for should become the property of the United States. Subcontractors claimed liens on the uncompleted vessel under the Virginia supply-lien law. This Court merely held that, as the property had [passed] to the United States by virtue of the terms of the contract, no lien could be enforced against it. No question was raised as to the rights possessed by the subcontractors prior to the acquisition of title by the United States nor as to whether that event entitled them to just compensation under the Fifth Amendment. There is, to be sure, reason to believe that the subcontractors' liens in that case, like those of petitioners here, did attach as soon as materials were furnished, which would necessarily be prior to the making of a progress payment for the portion of the work incorporating those materials and the conse-

[1] *United States v. Aerovox Rubber Co.*, 218 U. S. 452; *Hollerman Surety Co.*, 200 U. S. 197; *Equitable Surety Co. v. McMillan*, 234 U. S. 448; *United States v. Massey*, 237 U. S. 234; *The Siren*, 7 Wall. 152; *Minnesota v. United States*, 305 U. S. 382; *United States v. Alabama*, 313 U. S. 274.

quent passage of title to the United States. See *Hayes & Co. v. Trigg Co.*, 110 Va. 165, 185–186, 199. But the Fifth Amendment question was not raised or passed upon. In these circumstances we cannot regard the court's decision as dispositive on the precise point now under consideration, and must proceed to decide that question.

We hold that there was a taking of these liens for which just compensation is due under the Fifth Amendment. It is true that not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense. *Omnia Commercial Co. v. United States*, 261 U. S. 502, 508, 510. This case and many others reveal the difficulty of trying to draw the line between what destructions of property by lawful governmental actions are compensable "takings" and what destructions are "consequential" and therefore not compensable. See, *e. g.*, *United States v. Central Eureka Mining Co.*, 357 U. S. 155; *United States v. Causby*, 328 U. S. 256; *United States v. General Motors*, 323 U. S. 373; *United States v. Spangler*, 308 U. S. 256; *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393; *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467; *Legal Tender Cases*, 12 Wall. 457, 551.

The total destruction by the Government of all value of these liens, which constituted compensable property, has every possible element of a Fifth Amendment "taking" and is not a mere "consequential incidence" of a valid regulatory measure. Before the liens were destroyed the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because

The Government also cites *Walla Walla Co. v. United States*, 299 U. S. 83. The court there, however, recognized that the Government's action could not have destroyed any liens existing at the time the Government acquired the land because, as the court said, None remained upon the land which the purchaser contemplated." 299 U. S., at 95.

their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment. Neither the lienholders' immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here. Cf. *Thibodo v. United States*, 187 F. 2d 249.

The judgment is reversed and the cause is remanded to the Court of Claims for further proceedings to determine the value of the property taken.

Reversed and remanded.

MR. JUSTICE STEWART concurs in the result.

SUPREME COURT OF THE UNITED STATES

No. 270.—October Term, 1959.

Cecil W. Armstrong, et al., Petitioners, v. United States of America.	On Writ of Certiorari to the United States Court of Claims.

[June 27, 1960.]

Mr. Justice Harlan, whom Mr. Justice Frankfurter and Mr. Justice Clark join, dissenting.

I agree that petitioners had valid liens on the uncompleted work and supplies at the time the property was transferred to the Government, and that such liens represented compensable property interests within the meaning of the Fifth Amendment. But the Fifth Amendment renders the Government liable only if there was a "taking" by it of such interests. I cannot conclude, as the Court so readily does, that simply because the value of those liens was "destroyed" there was a "taking" of petitioners' property.

As the Court concedes, not every governmental act which ultimately destroys property rights constitutes a compensable taking of those rights. We are not here dealing with a situation in which the United States has condemned the full fee interest in property, thus purporting to extinguish all claims therein. In such a case, it may well be that lienholders are entitled to compensation for the value of their interests. *See Thibodo v. United States*, 187 F. 2d 249; cf. *United States v. General Motors Corp.*, 323 U. S. 373, 377–378. In this instance, however, the Government has not exercised its power of eminent domain with the intent and purpose of extinguishing petitioners' liens; indeed it has not exercised its power of eminent domain at all. All it has done

is to exercise its undoubted power to contract and to acquire title to the property, the consequent effect of which is to render the liens unenforceable because of the independent principle of sovereign immunity. The very nature of the doctrine of sovereign immunity precludes regarding its interposition as a Fifth Amendment "taking." It seems to me that a Court which, having established this immunity, then declares that the Government must pay for exercising it, is effectively negativing it.

I would affirm.